(28,534)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 579.

HENRY J. CONLEY, PLAINTIFF IN ERROR,

vs.

LLEWELLYN BARTON.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

INDEX.

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1 STATE OF MAINE,
Cumberland, ss:

Supreme Judicial Court, December Law Term, 1920.

In Equity.

LLEWELLYN BARTON, Complainant,
VS.
HENRY J. CONLEY, Respondent.

On Appeal by Respondent.

Appearances:
Samuel L. Bates, For Complainant.
Henry J. Conley, Pro se.

2 STATE OF MAINE,
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3 STATE OF MAINE,
Cumberland, ss:

Supreme Judicial Court.

In Equity.

LLEWELLYN BARTON
VS.
HENRY J. CONLEY.

To the Supreme Judicial Court, in Equity:

Llewellyn Barton of Portland in the County of Cumberland and State of Maine, complains against Henry J. Conley of said Portland

and says: First: That the plaintiff on the fourteenth day of October, A. D. 1905 was seized in fee simple of certain real estate in the town of Naples in said County of Cumberland, bounded and described as follows:

A certain lot or parcel of land containing about one acre, with the buildings thereon, comprising the Casino, so called, the Bowling Alley building adjoining together with the wharf connected therewith, situated at Naples Village, in the town of Naples, in the County of Cumberland, being the property formerly owned by the Longwood Real Estate Co., said parcel of land was conveyed to said Longwood Real Estate Co., by Philip O. Cannell of Naples, by his warranty deed, dated November 8, 1902 and recorded in Cumberland County Registry of Deeds, Book 727, Page 62, said parcel of land being bounded and described as follows:

Beginning at a point, in a line running 35 degrees east of south 75 feet, more or less from a certain stone post, near two willow trees, on the westerly side of the County road leading from Naples village to Portland, said point being at the intersection of line of the County Road and the southeasterly boundary of the Songo road, so called, thence along said line running 35 degrees east of south, 200 feet to a stone and stake; thence in the direction of Chute's River on a line 5 degrees north of east 250 feet to a stone and stake near a pine tree; thence on a line 26 degrees west of north 200 feet more or less to the County road leading from Naples to Portland, known as the "Roosevelt Road" thence along the southeasterly side of said road and road leading to Songo Lock, to the point of beginning, being about 50,000 square feet of land.

Second. That on said fourteenth day of October, being so seized of said real estate the plaintiff, by his mortgage deed of that date, conveyed said real estate to George W. Towle, to secure a certain promissory note of even date, with said mortgage for the sum of Two thousand dollars ($2,000), given by the plaintiff to said Towle, subject to redemption by the plaintiff or his legal representatives upon payment by them of the amount of said note, in two years from date thereof with interest at seven per cent per annum payable semi-annually.

Third. The plaintiff has, from time to time, since giving said mortgage, made payments on said note, for interest and rent amounting in all *fo* One thousand eight hundred and seventy-five dollars and forty cents ($1,875.40).

Fourth. That by assignment dated December 29th, A. D. 1919 acknowledged December 29th, A. D. 1919 and recorded in Cumberland Registry of Deeds the executors of said Towle Estate assigned said mortgage to the defendant herein.

Fifth. That the plaintiff has failed to perform the condition of said mortgage as to payment of the principal and interest of said mortgage in full.

Sixth. That after breach of the condition of said mortgage on the part of the plaintiff, the executors of said Towle, commenced foreclosure proceedings by taking possession on the twenty-second day of February, A. D. 1919. That the time to redeem said mortgaged premises from said foreclosure proceedings will expire on February 22, 1920.

Seventh. That there is now due on said debt, including interest and costs of foreclosure the sum of Two thousand thirty-nine dollars and sixty-six cents ($2,039.66); But the defendant refuses to accept said sum in payment of his said debt, and demands a much larger sum than is legally and justly due him on said debt.

Eighth. That on the 21st day of February, A. D. 1920, the plaintiff went to the residence of and place of business of said defendant, at reasonable and business hours, and carried with him Two thousand thirty-nine dollars and sixty-six cents ($2,039.66) legal tender, and attempted to find said defendant for the purpose of tendering to him, and paying to him (the defendant) the sums due him in said note and mortgage and the costs thereon, and the plaintiff did at the home and place of business of said defendant, on said February 21, A. D. 1920 at reasonable business hours to wit, at five thirty o'clock P. M. make a tender of the amount due the defendant as aforesaid. But on said February 21, A. D. 1920 the defendant had absented himself from his home and place of business and the plaintiff although he made diligent search, could not find the defendant.

Ninth. That on the second day of January A. D. 1920 and within one year from the date of the commencement of the foreclosure proceedings, and before the time of redeeming said premises had expired the plaintiff demanded of the defendant a true account of the sums due on said mortgage, but said defendant, unreasonably refused and neglected and has continually refused and neglected to render such account.

Tenth. That plaintiff hereby offers to pay defendant, Henry J. Conley, such sum as may be found to be equitably due said defendant under the terms of said mortgage, and brings into court and deposits with the Clerk thereof, with this bill, for that purpose Two thousand thirty-nine dollars and sixty-six cents ($2,039.66) the amount he believes to be due and to perform any other conditions which the Court may require.

Wherefore the plaintiff prays:

1. That an account may be taken of the sum equitably due defendant Henry J. Conley, as principal, interest and costs of foreclosure of said mortgage.

2. That the plaintiff may be allowed to redeem said mortgage premises by paying to said defendant, Henry J. Conley, such sum as may be found due him by said account.

3. That the defendant be ordered, upon payment of said sum to release all his right and title in said premises to this plaintiff.

4. That the plaintiff may have such other and further relief as the nature of the case may require.

6 5. That the plaintiff recover his costs herein.

And may it please this Honorable Court to issue its subpœna to the said Henry J. Conley, commanding him to appear before this Court and answer to this bill at the April Rules following and abide the order and decrees of Court thereon.

LLEWELLYN BARTON,
Plaintiff.

SAMUEL L. BATES,
Plaintiff's Solicitor.

7 STATE OF MAINE,
Cumberland, ss:

Supreme Judicial Court.

In Equity.

LLEWELLYN BARTON

vs.

HENRY J. CONLEY.

The Answer of the Defendant, Henry J. Conley, to the Bill of Complaint of Llewellyn Barton.

And now comes Henry J. Conley, defendant named in said bill of complaint, and answering says:

First. Answering paragraph one of this bill, the defendant admits each and every allegation contained therein.

Second. Answering paragraph two of this bill, the defendant admits each and every allegation contained therein.

Third. Answering paragraph three, this defendant has no knowledge of the matters set forth in paragraph three of said bill, but upon information and belief, denies each and every allegation contained therein, and demands proof of the same.

Fourth. Answering paragraph four of said bill, this defendant admits each and every allegation contained therein.

Fifth. Answering paragraph five of said bill, this defendant admits each and every allegation contained therein.

Sixth. Answering paragraph six of said bill, this defendant denies each and every allegation contained therein, except that which says that after breach of the condition of said mortgage on the part

of the plaintiff, the executors of said Towle commenced foreclosure proceedings by taking possession, and demands proof of each and every other allegation contained in paragraph six of this bill. Further answering paragraph six of this bill, the defendant says that after breach of the conditions of said mortgage on the part of the plaintiff, the executors of said Towle or one of them, com-
8 menced foreclosure proceedings by taking possession of the mortgaged premises, for the purpose of foreclosure, on the twentieth day of February A. D. 1919, and that the time to redeem said mortgaged premises from said foreclosure proceedings expired on the twentieth day of February A. D. 1920.

Seventh. The defendant denies each and every allegation in paragraph seven of this bill and demands proof of the same. Answering further paragraph seven, this defendant says, that there is now due on said debt, including interest and costs of foreclosure, a much larger sum than that named in paragraph seven of plaintiff's bill, and denies that the plaintiff ever offered to pay him any sum, whatever, which included the amount due on said debt, together with interest and costs of foreclosure, and demands proof of the same; and further says that if any sum whatever was ever offered, it was offered at a time after the period allowed by law for the redemption of said property from the foreclosure of said mortgage had expired.

Eighth. Answering paragraph eight, this defendant has no knowledge in regard to the allegations contained therein, but upon information and belief denies the same, and demands proof thereof. Further answering paragraph eighth, the defendant denies that the plaintiff at any time ever made a tender to him of any sum whatever in payment of the amount due on said debt, and demands proof thereof. And further says, that if any sum, whatever, was ever tendered, it was tendered at a time after the period allowed by law for the redemption of said property from the foreclosure of said mortgage had expired.

Ninth. Answering paragraph nine of this bill, the defendant denies each and every allegation therein contained, and demands proof of the same. Answering further paragraph nine of this bill, the defendant says, that on the seventh day of January A. D. 1920, and within one year from the date of the commencement of the foreclosure proceedings, and before the time of redeeming said premises had expired, the plaintiff did, through his attorney, Frank H. Haskell, demand of the defendant, a true account of the sum due on said mortgage, and that the defendant seasonably furnished said account as demanded, according to his best knowledge and belief on a certain day, to wit, on the 17th day of January A. D. 1920.

9 Tenth. Answering paragraph ten this defendant has no knowledge in regard to the allegations contained therein, but upon information and belief denies the same, and further says, that on account of the manner in which the matters contained in said paragraph are framed they do not constitute any allegation, do not

comply with the law with reference to the matter of redemption, and require no answer.

Wherefore, he prays judgment, and that he may be hence dismissed, and for his costs.

Dated at Portland, this 30th day of April, A. D. 1920.

HENRY J. CONLEY,
Defendant pro se.

[*Motion to Amend Plaintiff's Bill.*]

Now comes Llewellyn Barton, the plaintiff in the above named case, and asks leave to amend his bill by adding thereto the following paragraph:

Eleventh. The plaintiff further alleges that more than three months have elapsed since the expiration of one year from the time when the legal representatives of the mortgagee of the mortgage described in the plaintiff's bill, took possession of the mortgaged property for the purpose of foreclosing said mortgage but neither the mortgagee nor the holder of record of said mortgage, nor the legal representative or legal representatives, of either the mortgagee or holder of record of said mortgage nor any other person, has signed and sworn to an affidavit as required in cases of foreclosure of mortgages of real estate by Section 4 of Chapter 95 of the Revised Statutes of Maine as amended by Chapter 192 of the Public Laws of A. D. 1917, and no such affidavit has been recorded in the Registry of Deeds where the certificate of said foreclosure is recorded, as required by said statute, and these facts were not known to the plaintiff at the time of filing his said bill as said three months had not elapsed at the time of filing said bill.

LLEWELLYN BARTON.

Subscribed and sworn to by the above named Llewellyn Barton before me this May 24 A. D. 1920.

SAMUEL L. BATES,
Justice of the Peace.

Hearing on within motion to amend ordered on June 2nd, 1920, at 2:30 P. M. Notice of said hearing to be given to defendant by mailing to him postage prepaid a copy of within motion and the order thereon five days prior to the date of said hearing.

SCOTT WILSON,
Justice Sup. Jud. Court.

May 24, 1920.

11 STATE OF MAINE,
Cumberland, ss:

Supreme Judicial Court.

In Equity.

LLEWELLYN BARTON

vs.

HENRY J. CONLEY.

[*Motion to Amend Defendant's Answer to Plaintiff's Bill.*]

Defendant in the above case now comes, asking leave to amend his answer herein, by adding the following matter thereto:

"Eleventh: The Defendant, answering the eleventh amended paragraph of the plaintiff's complaint, alleges—

'(*a*) That Chapter 192 of the Public Laws of A. D. 1917, amending Section 4 of Chapter 95 of the Revised Statutes of the State of Maine, has no application and no relevancy to the plaintiff's rights or cause of action herein.

'(*b*) That, if the plaintiff makes a claim that said Chapter 192 of the Public Laws of A. D. 1917, amending Section 4 of Chapter 95 of the Revised Statutes of Maine, grants to the plaintiff any additional time beyond the one year as covenanted in the Mortgage Deed in question herein to redeem his equity, then defendant alleges such legislative act is and would be contrary to the provisions of Section 10 of the Constitution of the United States and to the covenant of the Mortgage Deed itself, and, therefore, void and of no effect.

'(*c*) That the plaintiff is estopped by his written consent of allowance made and delivered to the defendant's assignors to take possession of the premises mentioned in the Mortgage Deed herein, from asserting any claim of title or any equity in or to the premises mentioned in the Mortgage Deed in question after the expiration of one year from the twentieth day of February, A. D. 1919.

HENRY J. CONLEY,
Defendant pro se.

12 Dated at Portland, Maine, this fifteenth day of June, A. D. 1917.

Amendment allowed on condition that defendant furnish plaintiff's attorney of record with a copy of same on or before June 16th, 1920.

SCOTT WILSON,
Justice Sup. Jud. Court.

June 15, 1920.

13 STATE OF MAINE,
Cumberland, ss:

Supreme Judicial Court.

In Equity.

LLEWELLYN BARTON

vs.

HENRY J. CONLEY.

The Replication of the Plaintiff Llewellyn Barton to the Answer and Amended Answer of Henry J. Conley the Defendant.

The plaintiff says that the allegations contained in his bill as amended are true, and those in the defendant's answer, as amended, are not true, and this he is ready to prove.

SAMUEL L. BATES,
Solictor for the Plaintiff.

14 STATE OF MAINE,
Cumberland, ss:

Supreme Judicial Court.

In Equity.

LLEWELLYN BARTON

vs.

HENRY J. CONLEY.

And now comes the defendant, Henry J. Conley, and asks this court for rule allowing the following as an amendment to his answer to the plaintiff's Bill herein:

Twelfth. That generally answering the entire Bill, on the 25th day of February, 1919, plaintiff by lease in writing confirmed the title to the premises in question in defendant's assignors and therefore attorned to Geo. E. Davis and Orman L. Stanley said assignors as owners and lessors of the said premises. And that thereby plaintiff is estopped from now making any claim of title or equity in said premises.

HENRY J. CONLEY,
Defendant pro se.

15 [*Findings and Ruling by the Court.*]

STATE OF MAINE,
Cumberland, ss:

Supreme Judicial Court.

In Equity.

LLEWELLYN BARTON
vs.
HENRY J. CONLEY.

A bill in equity to redeem a mortgage, which was given October 14th, 1905. The mortgage contains the usual provision that the right of redemption shall be forever foreclosed in one year next after the commencement of foreclosure proceedings by any of the methods now provided by law.

On February 20th, 1919, a breach of the mortgage having been committed, the then holder of the mortgage who afterwards assigned it to the defendant, entered into possession of the premises for the purpose of foreclosure and duly recorded a certificate of the fact in the Registry if Deeds for Cumberland County as required by law.

On the 21st day of February, 1920, the plaintiff filed his bill in equity in the office of the Clerk of Courts in this County in which he alleges that the period of redemption of said mortgage expired February 22, 1920, and that on said 21st day of February he diligently sought to locate the defendant both at his home and place of business for the purpose of making tender of the sum due on said mortgage and redeeming the same but failed to find the defendant, and the defendant though requested having failed to furnish the plaintiff with a true account of the sum due on said mortgage, the plaintiff deposited in court at the time of filing said bill a sum sufficient to pay the sum due on said mortgage, and prays for an accounting and that he may be permitted to redeem said mortgage by paying the amount found to be justly due thereon.

On May 24th, 1920, the plaintiff moved to amend his bill setting forth in his proposed amendment that neither the mortgagee nor the holder of the mortgage, nor their legal representatives, nor
16 any person had signed, sworn to and recorded in the Registry of Deeds of this county the affidavit required by sec. 4 of chap. 95 R. S., as amended by chap. 192, Public Laws of 1917, which the Court, being of the opinion that no injustice would be done thereby, in its discretion allowed.

While we find that the allegation that the possession of said premises was not taken until February 22, 1919, was made in good faith it is now admitted that as a matter of fact possession was taken on the 20th day of February, 1919, so that unless the foreclosure proceedings have been rendered null and void, or the period of redemption has been extended, by the defendant's failure to file the affidavit

required by the statute, the plaintiff's right of redemption is barre and his bill must be dismissed.

The sole issue outside of the amount due is the effect of th statute found in chap. 192 of the Public Laws of 1917. The defend ant claims that if held to apply to his mortgage, it impairs the mor gage contract which the plaintiff entered into in 1905 and is there fore in violation of his constitutional rights.

Admitting this premise, the defendant's position is of course unassailable.

The plaintiff claims that the statute of 1917, chap. 192, in no wa curtails the rights of the mortgage, since the period of redemptio expires in one year as provided in the mortgage contract, unless b his laches or voluntary act he extends the time of redemption b failing to record the affidavit required by statute. In other word the essence of his contract is in no way affected except by his ow choice or neglect, and in either event he should not be permitted complain. The case relied upon by the defendant, Burnity Beverly, 163 U. S. 118, arbitrarily extended the period of redem tion. The method of foreclosure was one of those provided by la October 14, 1905, and if the defendant had complied with the statu of 1917 in respect to filing the affidavit which simply sets forth effect that his possession has been continuous for the year require and he has done no act waiving his rights under his foreclosure pr ceedings then the plaintiff's right of redemption would have expire in one year, or February 20th, 1920.

17 The question at issue is not wholly free of doubt. Und the usual practice of this Court, however, the course of th sitting Justice seems clear. The legislature of the State has clear by implication made this Act applicable to all foreclosure proce ings begun after it took effect. As a single member of this Cou where any doubt exists, we hesitate to declare a solemn act of the leg lative branch of our government contrary to the provisions of eith our State or Federal constitution.

We therefore hold that chap. 192 of the Public Laws of 1917 a plies to all foreclosure proceedings begun since its passage, that does not curtail the rights of the mortgagee under mortgages e tered into prior to its becoming law, or essentially impair the mo gage contract. Any change in the mortgage or statutory period redemption, or as to the effect of any foreclosure proceedings beg by a holder of a mortgage since this act took effect, by reason of provisions, obviously results only through the laches or volunta act of the holder of the mortgage himself.

The p-aintiff's bill is therefore sustained with costs. The plaint may redeem the mortgaged premises upon the payment of t amount now due on the mortgage indebtedness less the rents a profits received by the holder of the mortgage since possession take which the Court finds tentatively, according to the computatio hereto annexed, which are subject to correction, to be the sum $1,774.12 together with legal costs of foreclosure.

Decree in accordance with above findings.

Dated July 29, 1920. SCOTT WILSON,
Justice Sup. Jud. Court.

18	Amount due on mortgage		$2,000.00
	Int. on $2,000 from Oct. 14, 1905 to Oct. 14, 1907 at 7%	$280.00	
	Int. on $2,000 from Oct. 14, 1907 to May 1st, 1914 at 6%	785.34	
			1,065.67
	Due May 1st, 1914		3,065.67
	Total payments to May 1st, 1914		1,078.40
			1,987.27
	Int. at 6% to June 1, 1914		9.94
			1,997.21
	Payment June 1st, 1914		25.00
			1,972.21
	Int. at 6% June 1st, 1914 to June 4, 1914		.99
			1,973.20
	Payment June 4th		300.00
			1,673.20
	Int. at 6% June 4, 1914 to Sept. 1st, 1914		24.54
			1,697.74
	Payment Sept. 1st, 1914		25.00
			1,672.74
	Int. at 6% from Sept. 1st to Sept. 29, 1914		7.26
			1,680.00
	Payment Sept. 29, 1914		25.00
			1,655.00
	Int. at 6% from Sept. 29, 1914 to Nov. 2, 1914		9.37
			1,664.37
	Payment Nov. 2, 1914		25.00
			1,639.37
19	Amount Brought Forward		$1,639.37
	Int. at 6% from Nov. 2 to Dec. 2, 1914		8.20
			1,647.57
	Payment Dec. 2nd, 1914		25.00
			1,622.57
	Int. at 6% from Dec. 2, 1914 to Feb. 27, 1915		22.99
			1,645.56

Payment Feb. 27, 1915		25.00
		1,620.56
Int. at 6% from Feb. 27 to Mar. 30, 1915		8.01
		1,629.47
Payment Mar. 30, 1915		25.00
		1,604.47
Int. at 6% from Mar. 30, 1915 to May 31, 1915		16.31
		1,620.78
Payment May 31, 1915		25.00
		1,595.78
Int. at 6% from May 31, 1915 to June 30, 1915		7.98
		1,603.76
Payment June 30, 1915		25.00
		1,578.76
Int. at 6% from June 30 to Sept. 30, 1915		23.68
		1,602.44
Payment Sept. 30, 1915		25.00
		1,577.44
Int. from Sept. 30, 1915 to Nov. 8, 1915		10.25
		1,587.69
20 Amount Brought Forward		$1,587.69
Payment Nov. 8, 1915		25.00
		1,562.69
Int. from Nov. 8, 1915 to Jan. 11, 1916		16.40
		1,579.09
Payment Jan. 11, 1916		25.00
		1,554.09
Int. from Jan. 11, 1916 to March 30, 1916		20.72
		1,574.81
Payment Mar. 30, 1916		25.00
		1,549.81
Int. from Mar. 30 to May 15, 1916		11.62
		1,561.43

Payment May 15, 1916		25.00
		1,536.43
Int. from May 15, 1916 to July 29, 1920 at 6%		387.69
		$1,924.12
Payment July 9, 1917	$25.00	
Received from rents and profits	125.00	
		150.00
		$1,774.12

21 [*Special Master's Report.*]

STATE OF MAINE,
Cumberland, ss:

Supreme Judicial Court.

In Equity.

Docket No. 3032.

LLEWELLYN BARTON

vs.

HENRY J. CONLEY.

Pursuant to an order of reference in said case and upon application of the plaintiff I assigned the second day of August, 1920, at 10 o'clock A. M. at my office, Room 914 Fidelity Building, Portland, Maine, as the time and place for a hearing before me and notified the adverse party to appear at said time and place and make proof of the matters referred, at which time and place the plaintiff by his attorney appeared and the defendant did not appear, either by himself or attorney. A hearing was had and evidence introduced and upon consideration thereof I find as follows:

(1) I find that at no time did an interest payment, either alone or in conjunction with the preceding payments, on the mortgage note exceed the interest due on said mortgage note at the time of said interest payments.

(2) I have therefore, computed interest at 7% per annum from the date of the mortgage note to the allowance of the amendment of the plaintiff's bill, namely June 2, 1920.

(3) I find that $300 was paid on the principal of the note on June 4, 1914, and the interest was computed from said date on the face of the note less said $300.

(4) I find the total amount of interest due on said note to be $1,922.78, which added to the balance of the principal of said note,

to wit, $1,700 makes a total of $3,622.78, and I find *that* the total amount of interest payments on said note to be $1,453.40, leaving a balance of $2,169.38.

22 (5) From the above amount, namely, $2,169.38 I have deducted $125 which was received as profits by said mortgagee after possession of the property was taken by said mortgagee said profits at the time received added to the payments of interest on said mortgage note up to that time did not exceed the interest due on the mortgage note at that time.

(6) Deducting said $125 from said sum of $2,169.38 leaves a balance of $2,044.38 due on said note at the time of the allowance of the amendment, to wit, June 2, 1920.

(7) I find that nothing was expended for repairs and improvements on the mortgaged premises.

(8) I have not allowed any attorney's fee or other costs of foreclosure because no evidence was produced of any sum actually being paid in full or partial discharge of the attorney's fee and no evidence was introduced of any other costs of foreclosure.

Dated August 4, 1920.

JOHN H. PIERCE,
Special Master.

Fees of Master: 2 days, $20.00.

Hearing ordered on acceptance within report on Friday, Aug. 6th, 1920 at Court House, at 1-30 o'clock. Notice to be given to defendant by service of copy of within report and this order thereon 24 hours before time set for said hearing.

Aug. 4th, 1920.

SCOTT WILSON,
Justice Sup. Jud. Court.

Aug. 6th, 1920.

After hearing the parties Master's report accepted and fees ordered paid from the County Treasury.

SCOTT WILSON,
Justice Sup. Jud. Court.

23 [*Objection to the Report of Special Master.*]

STATE OF MAINE,
Cumberland, ss:

Supreme Judicial Court.

In Equity.

No. 3032.

LLEWELLYN BARTON

vs.

HENRY J. CONLEY.

And now, on the sixth day of August, A. D., 1920, at one o'clock and thirty minutes in the afternoon, the time ordered by the Court for hearing on acceptance of the report of John H. Pierce, Special Master, comes Henry J. Conley, defendant in the above entitled cause, and objects and excepts to the findings and report of said John H. Pierce, Special Master, and thereupon he says:

1. That said report does not include the fee of Fifteen Dollars ($15) expenses of foreclosure, admitted and computed by the plaintiff in the account by him tendered to this Court on the trial of this action.

2. That, until the question as to the constitutionality of the Statute of 1917, involved as a question in this case, is finally passed upon, there can be no question of amount due in this action.

3. That the Special Master has mistaken his term days of interest, and disregarded the proper total of legal interest under the "claimed" tender in this action.

4. That the Special Master did not legally compute the amount due on said mortgage and note.

HENRY J. CONLEY,
Defendant, pro se.

24 STATE OF MAINE,
Cumberland, ss:

Supreme Judicial Court.

In Equity.

LLEWELLYN BARTON

vs.

HENRY J. CONLEY.

Now comes the Plaintiff and pays into and deposits in Court in said case the sum of forty three dollars and eighty cents ($43.80) to add to the deposit already made in Court by the plaintiff, making the total deposit equal to the sum found due on the mortgage by the Special Master as per his report now on file in said case. And I have this day sent to the defendant by registered letter, a copy of this tender.

LLEWELLYN BARTON,
Plaintiff.

By SAMUEL L. BATES,
His Attorney of Record in Fact in Said Case.

(The above mentioned deposit was made in the Clerk's office, August eleventh, A. D. 1920.

25 (*Final Decree.*)

STATE OF MAINE,
Cumberland, ss:

Supreme Judicial Court.

In Equity.

LLEWELLYN BARTON

vs.

HENRY J. CONLEY.

Date of Hearing June 24th, 1920.

This cause came on to be heard this day, upon bill, answer and replication, evidence was submitted and the case was argued by counsel, and thereupon, and upon consideration thereof and of the special master's report, it is ordered, adjudged and decreed, as follows, viz: That the plaintiff's bill be sustained with costs, that the plaintiff may redeem the mortgaged premises upon the payment to the defendant of the sum due on the mortgage indebtedness, that

there is due on the debt secured by the mortgage, including interest to the date of this decree, the sum of two thousand and seventy-six dollars and twelve cents ($2,076.12) that said sum having been deposited in Court by the plaintiff, the clerk of said court is hereby ordered to pay said sum to the defendant, and the defendant is hereby ordered to discharge said mortgage, or a copy of this decree, duly attested by the clerk of this Court, and recorded in the registry of deeds in this County, shall constitute a discharge of said mortgage.

SCOTT WILSON,
Justice of the Supreme Judicial Court.

Dated September 9th, 1920.

26 [*Objection to Final Decree.*]

STATE OF MAINE,
Cumberland, ss:

Supreme Judicial Court.

In Equity.

LLEWELLYN BARTON

vs.

HENRY J. CONLEY.

And now, on this eighth day of September, A. D., 1920, and within five days of the time of receipt of notice of the filing of form of decree and final hearing in the above entitled cause, comes Henry J. Conley, defendant therein, and objects and excepts to the filing allowance and making of said order, judgment and decree, because he says that at the time of any and all hearings in said cause, and ever since the 20th day of February, A. D., 1920, he, the said defendant, has been, and now is, the owner in fee simple of all of the real estate described in a certain mortgage deed now on file in said cause in said Supreme Judicial Court having acquired title by lawful foreclosure of said mortgage, and that said mortgage is forever foreclosed and not subject to redemption as provided for in said order, judgment and decree.

HENRY J. CONLEY,
Defendant, pro se.

Dated September 8th, 1920.

27 [*Appeal.*]

STATE OF MAINE,
Cumberland, ss:

Supreme Judicial Court.

No. 3032.

In Equity.

LLEWELLYN BARTON

vs.

HENRY J. CONLEY.

And now, after hearing and decision on the bill in the above entitled cause, and within ten days after the final decree on such bill was signed, entered and filed, and notice thereof given by the Clerk of said Court to the parties in the said cause, or their counsel, comes Henry J. Conley, defendant in said cause, and claims and takes an appeal from said decree, and from the Special Master's report in said cause, to the next Law Court to be held in the district where said cause is pending.

HENRY J. CONLEY,
Defendant, pro se.

Sept. 16th, 1920.

28 *Mortgage.*

Know all men by these presents:

That I, Llewellyn Barton, of Portland, County of Cumberland and State of Maine in consideration of Two Thousand dollars, paid by George W. Towle of Parsonsfield, County of York and State of Maine, the receipt whereof I do hereby acknowledge, do hereby give, grant, bargain, sell and convey, unto the said George W. Towle, his heirs and assigns forever, The following described real estate, viz: The lot or parcel of land, containing about an acre, more or less, with the buildings thereon, comprising the Casino, so called, and the Bowling Alley building adjoining, together with the wharf connected therewith, situated at Naples Village, in the town of Naples, in said County of Cumberland, it being all the property formerly owned by the Longwood Real Estate Co., Said lot or parcel of land was conveyed to said Longwood Real Estate Co. by Philip O. Cannell, of said Naples, by his warranty deed dated November 8th, A. D. 1902, and recorded in Cumberland County Registry of Deeds, Book 727, Page 62, to which record reference is made for a definite description of the boundaries of the lot of land herein conveyed.

To have and to hold the aforegranted and bargained premises, with all the privileges and appurtenances thereof to the said George W. Towle, his heirs and assigns, to their use and behoof forever.

And I do covenant with the said Grantee, his heirs and assigns, that I am lawfully seized in fee of the premises; that they are free of all incumberances; that I have good right to sell and convey the same to the said Grantee to hold as aforesaid; and that I and my heirs shall and will warrant and defend the same to the said Grantee his heirs and assigns forever, against the lawful claims and demands of all persons.

Provided nevertheless, That if the said Llewellyn Barton, his heirs, executors, or administrators pay to the said George W. Towle, his heirs, executors, administrators or assigns, the sum of Two Thousand Dollars in two years from the day of the date hereof, with interest on said sum at the rate of 7 per centum per annum, during said term, and for such further time as said principal sum or
29 any part thereof shall remain unpaid payable semi-annually, then this Deed, as also one certain promis-ory note bearing even date with these presents, given by the said Llewellyn Barton to the said George W. Towle, to pay the sum and interest at the time aforesaid shall both be void, otherwise shall remain in full force.

Said grantor agrees to keep the above described premises insured in a responsible company, in the sum of not less than Twenty-Five Hundred Dollars ($2,500.00).

And the said grantor hereby covenants and agrees with the said grantee that the right of redeeming the above mortgaged premises shall be forever foreclosed in one year next after the commencement of foreclosure by any of the methods now provided by law.

In witness whereof, the said Llewellyn Barton and Grace L. Barton, wife of the said Llewellyn Barton, joining in this deed as Grantors, and relinquishing and conveying all rights by descent and all her other rights in the above described premises, have hereunto set their hands and seals this Fourteenth day of October in the year of our Lord one thousand nine hundred and five.

LLEWELLYN BARTON. [L. S.]
GRACE L. BARTON. [L. S.]

Signed, Sealed and Delivered in presence of
ERNEST E. NOBLE.
ANNIE A. ROYE to G. L. B.

STATE OF MAINE,
Cumberland, ss:

Portland, Maine, Oct. 14, 1905.

Personally appeared the above named Llewellyn Barton and acknowledged the above instrument to be his free act and deed.

Before me,

ERNEST E. NOBLE,
Justice of the Peace.

30 CUMBERLAND, *ss:*

Registry of Deeds.

Received Oct. 14, 1905, at 12 H. 22 M. P. M., and recorded in Book 768, Page 291.

Attest:

RAY P. EATON,
Register.

31 *Mortgage Note.*

$2,000.00. Portland, Me., Oct. 14th, 1905.

Two years after date I promise to pay to the order of George W. Towle, Parsonsfield, Me., Two Thousand Dollars *at* with interest at 7% per annum, payable semi-annually.

Value received.

No —. Due —— —.

LLEWELLYN BARTON.

(Endorsements on Reverse.)

Paid Apr. 30, 1906, Int.	$70.00
Paid Jany. 30, 1907, Int.	71.40
Paid Sept. 3, 1907, Int.	35.00
Paid Oct. 5, 1907, Int.	37.00
Paid Jany. 4, 1908, Int.	35.00
Paid Aug. 20, 1908, Int.	35.00
Paid Oct. 1, 1908, Int.	35.00
Paid Dec. 30, 1908, Int.	35.00
Paid Mar. 1, 1909, Int.	35.00
Paid May 3, 1909, Int.	35.00
Paid June 1, 1909, Int.	15.00
Paid Aug. 24, 1909, Int.	25.00
Paid Sept. 1, 1909, Int.	50.00
Paid Jany. 4, 1910, Int.	20.00
Paid Oct. 3, 1910, Int.	50.00
Paid Mar. 3, 1911, Int.	25.00
Paid Mar. 18, 1911, Int.	20.00
Paid June 1, 1911, Int.	50.00
Paid Sept. 14-25, 1911, Int.	50.00
Paid Jan. 20 & 26, 1912, Int.	50.00
Paid June 1, 1912, Int.	25.00
Paid Oct. 1, 1912, Int.	50.00
Paid Dec. 30, 1912, Int.	25.00
Paid Mar. 1, 1913, Int.	25.00
Paid Aug. 9, 1913, Int.	25.00
32 Paid Oct. 31, 1913, Int.	25.00
Paid Dec. 6 & 31, 1913, Int.	50.00
Paid Feb. 3, 1914, Int.	25.00

Paid March 31, 1914, Int.	25.00
Paid May 1, 1914, Int.	25.00
Paid June 1, 1914, Int.	25.00
Paid June 4, on Principal	300.00
Paid Sept. 1, 1914	25.00
Paid Sept. 29, 1914	25.00
Paid Nov. 2, 1914	25.00
Paid Dec. 2, 1914	25.00
Paid Feb. 27, 1915	25.00
Paid March 30, 1915	25.00
Paid May 31, 1915	25.00
Paid June 30, 1915	25.00
Paid Sept. 30, 1915	25.00
Paid Nov. 8, 1915	25.00
Paid Jany. 11, 1916 on Int.	25.00
Paid Mar. 30, 1916 on Int.	25.00
Paid May 15, 1916 on Int.	25.00
Paid July 9, 1917	25.00

Without recourse.

ESTATE OF GEORGE W. TOWLE,
O. L. STANLEY,
Exec.

33 *Foreclosure of Mortgage.*

Whereas I, Llewellyn Barton, of Portland, County of Cumberland and State of Maine, by my deed of mortgage, dated the fourteenth day of October, A. D. 1905, and recorded in the Cumberland County Registry of Deeds, Book 768, Page 291, conveyed to George W. Towle, the following described premises:—A lot or parcel of land, containing about an acre, more or less, with the buildings thereon, comprising the Casino, so called, and the Bowling Alley building adjoining, together with the wharf connected therewith, situated at Naples Village in the town of Naples, in said County of Cumberland, it being all the property formerly owned by the Longwood Real Estate Co., said lot or parcel of land was conveyed to said Longwood Real Estate Co. by Philip O. Cannell, of said Naples, by his warranty deed, dated Nov. 8th, A. D. 1902, and recorded in Cumberland County Registry of Deeds, Book 727, Page 62, to which record reference is made for a definite description of the boundaries of the lot of land herein conveyed; and whereas the condition of said mortgage is broken;

Now, Therefore, I hereby consent that George E. Davis and Orman L. Stanley, Executors of the Will of said George W. Towle, late of Parsonsfield in the County of York State of Maine, deceased, owners of said mortgage, may enter into possession of the said premises and hold the same for the purpose of foreclosure because of the breach of said condition.

LLEWELLYN BARTON.

Portland, Maine, Feb. 5th, 1919.

STATE OF MAINE,
County of Cumberland, ss:

Feb. 5th, 1919.

Signed and sworn to by the said Llewellyn Barton,
Before me,

PERLEY C. DRESSER,
Justice of the Peace.

34 We, the above named executors holding the above described mortgage, certify, on oath, that on the 20th day of February A. D. 1919, by the within written consent of said mortgagor, we entered into possession of the within described mortgaged premises for foreclosure of said mortgage by reason of a breach of its condition.

GEORGE E. DAVIS,
ORMAN L. STANLEY,
Executors of Will of Geo. W. Towle.

STATE OF MAINE,
County of Oxford, ss:

Porter, Feb. 22, 1919.

Signed and sworn to, by the said George E. Davis and Orman L. Stanley in their capacity of executors.
Before me,

MYRON H. RIDLON,
Justice of the Peace.

STATE OF MAINE,
Cumberland, ss:

Registry of Deeds.

Received Feb. 25, 1919 at 9 H.—M. A. M. and recorded in Book 1020, Page 150.
Attest:

NORMAN TRUE,
Register.

35 *Statement of Amount Due on Mortgage and Note Given by Llewellyn Barton to George W. Towle, Dated October* 14, 1905.

Note	$2,000.00
Interest to January 15, 1920	1,997.58
	$3,997.58

Cr.

1906				
April	30,	By	Cash	$70.00
1907				
Jan.	30,	"	"	71.40
Sept.	3,	"	"	35.00
Oct.	5,	"	"	37.00
1908				
Jan.	4,	"	"	35.00
Aug.	20,	"	"	35.00
Oct.	1,	"	"	35.00
Dec.	30,	"	"	35.00
1909				
Mar.	1,	"	"	35.00
May	3,	"	"	35.00
June	1,	"	"	15.00
Aug.	24,	"	"	25.00
Apr.	1,	"	"	50.00
1910				
Jan.	4,	"	"	20.00
Oct.	3,	"	"	50.00
1911				
Mar.	3,	"	"	25.00
Mar.	18,	"	"	20.00
June	1,	"	"	50.00
Sept.	14-25,	"	"	50.00
36				
1912				
Jan.	20-26,	"	"	50.00
June	1,	"	"	25.00
Oct.	1,	"	"	50.00
Dec.	30,	"	"	25.00
1913				
Mar.	1,	"	"	25.00
Aug.	9,	"	"	25.00
Oct.	31,	"	"	25.00
Dec.	6-31,	"	"	50.00

1914				
Feb.	3,	"	"	25.00
Mar.	31,	"	"	25.00
May	1,	"	"	25.00
June	1,	"	"	25.00
June	4,	"	"	300.00
Sept.	1,	"	"	25.00
Sept.	29,	"	"	25.00
Nov.	2,	"	"	25.00
Dec.	2,	"	"	25.00
1915				
Feb.	27,	"	"	25.00
Mar.	30,	"	"	25.00
May	31,	"	"	25.00
June	30,	"	"	25.00
Sept.	30,	"	"	25.00
Nov.	8,	"	"	25.00
1916				
Jan.	11,	"	"	25.00
Mar.	30,	"	"	25.00
May	15,	"	"	25.00
1917				
July	9,	"	"	25.00
				$1,753.40

	Amount due on Note Jan. 15, 1920		$2,244.18
	Amount due on Note Feb. 5, 1920		2,253.22
	Amount due on Note Feb. 22, 1920		2,260.64
37	Cash received from rents and profits	$125.00	
	Cash expended in repairs and improvements	000.00	

No money was received by me.

HENRY J. CONLEY,
Assignee.

38 Portland, Me. Jan. 17, 1920.

[Lease, Fire Clause.]

This Indenture, Made the twenty-fifth day of February in the year of our Lord one thousand nine hundred and nineteen.

Witnesseth, That We, George E. Davis and Orman L. Stanley Executors of the Will of George W. Towle, late of Parsonsfield in the County of New York State Maine, deceased do hereby lease, demise

and let unto Llewellyn Barton of Portland in the County of Cumberland and State of Maine, the lot of land containing about an acre, more or less, with the buildings thereon, comprising the Casino, so called, and the Bowling Alley building adjoining together with the Wharf connected therewith, situated at Naples Village in the town of Naples in said County of Cumberland, being the same premises conveyed to said Towle by deed of mortgage from said Barton dated Oct. 14th, A. D. 1905, and recorded in the Cumberland County Registry of Deeds Book 768, Page 291.

To hold for the term of ten months from the first day of March, 1919 yielding and paying therefor the rent of twenty-five dollars per month. And said Lessee does promise to pay said rent in three payments as follows: one hundred and twenty-five dollars on or before the first day of August, 1919; fifty dollars on or before the first day of Oct. 1919; and the balance seventy-five dollars on or before the first day of Jan. 1920, and to quit and deliver up the premises to the Lessors, or their attorney, peaceably and quietly at the end of the term aforesaid, in as good order and condition,—reasonable use and wearing thereof, or inevitable accident, excepted,—as the same are, or may be put into by said Lessors, and not make or suffer any waste thereof; and that he will not assign or underlet the premises or any part thereof, without the consent of the Lessor in writing, on the back of this Lease. And the Lessors may enter to view and make improvement, and to expel the Lessee if he shall fail to pay the rent aforesaid, whether said rent be demanded or not or if he shall make or suffer any strip or waste thereof, or shall fail to quit and surrender the premises to the Lessors at the end of said term in manner aforesaid, or shall violate any of the covenants in this Lease by said Lessee to be performed.

39 All taxes assessed upon the premises are to be paid by the said lessee by Oct. 1st.

And the premises shall not be occupied during the said term, for any purpose usually denominated extra-hazardous, as to fire, by Insurance Companies.

In witness whereof, The parties have hereunto interchangeably set their hands and seals, the day and year first above written.

GEORGE E. DAVIS,
ORMAN L. STANLEY,
Executors of Will of Geo. W. Towle.
LLEWELLYN BARTON.

Signed, Sealed and delivered in presence of
MYRON H. RIDLON to G. E. D. & O. L. S.
EDMUND MAHONEY to L. B.

40 Know all Men by These Presents,

That I, Orman L. Stanley, Sole Surviving Executor of Will of George W. Towle late of Parsonfield, York Co., Maine, owner of a certain mortgage given by Llewellyn Barton to George W. Towle dated Oct. 14 A. D. 1905, and recorded in Cumberland Registry of Deeds, Book 768, Page 291, in consideration of one dollar and other

valuable considerations, paid by Henry J. Conley of Portland, Cumberland Co., Maine, the receipt whereof is hereby acknowledged, do hereby sell, assign, transfer and convey unto the said Henry J. Conley the said mortgage deed, the note, debt and claim thereby secured, and all my right, title and interest, by virtue of said mortgage, in and to the real estate therein described.

To Have and to Hold the same to the said Henry J. Conley and his heirs and assigns to their own use and behoof forever, subject, nevertheless to the conditions therein contained and to redemption according to law.

In Witness Whereof, I the said Orman L. Stanley, Executor have hereunto set my hand and seal this twenty-second day of December A. D. 1919.

ORMAN L. STANLEY. [SEAL.]
Sole Surviving Executor Will of George W. Towle.

Signed, Sealed and Delivered in presence of
LON M. DRAKE.

41 STATE OF MAINE,
York, ss:

Dec. 22, 1919.

Then personally appeared the above-named Orman L. Stanley, Executor, and acknowledged the foregoing instrument to be his free act and deed, in said capacity.

Before me,
[SEAL.] SIDNEY R. BATCHELDER,
Notary Public.

CUMBERLAND, *ss:*

Registry of Deeds.

Received Jan. 14, 1920, at 1 h. 15 m. P. M., and recorded in Book 1043, Page 120.

Attest:
NORMAN TRUE,
Register.

A true copy of all the papers in the case, filed prior to entry upon Law Court Docket.

Attest:
[SEAL.] LINWOOD F. CROCKETT,
Clerk.

42 I, Llewellyn Barton of Portland in the County of Cumberland, and State of Maine, the plaintiff in the bill in equity, Llewellyn Barton vs. Henry J. Conley, which said bill in equity is numbered 3032 on the docket for the Supreme Judicial Court for

Cumberland County, and which was returnable to said court at the April Rules A. D. 1920, to wit, the sixth day of April A. D. 1920, being duly sworn, on oath depose and say, that on this thirtieth day of March A. D. 1921, I tendered to Henry J. Conley, the defendant in said case, the sum of two thousand one hundred and forty three dollars and fifty-six cents ($2143.56), in money which was and is legal tender for the payment of debts in the United States, as full settlement of the mortgage mentioned and described in said bill in equity, and of the debt thereby secured.

That said Henry J. Conley refused to accept said tender, and I now bring said sum into court, it being the identical money so tendered.

At Portland aforesaid this thirtieth day of March A. D. 1921.

LLEWELLYN BARTON.

STATE OF MAINE,
Cumberland, ss:

Portland, March 30th, A. D. 1921.

Then personally appeared the above named Llewellyn Barton, and being duly sworn, made oath that the above statement by him signed is true, before me,

SAMUEL L. BATES,
Justice of the Peace.

Ordered that said sum so paid into Court be held and be paid to said Henry J. Conley upon request by him.

SCOTT WILSON,
Justice Sup. Jud. Court.

Mar. 30th, 1921.

43 STATE OF MAINE,
Cumberland, ss:

Supreme Judicial Court.

In Equity.

To the Hon. Justice of the Supreme Judicial Court:

In the case, Llewellyn Barton vs. Henry Conley, No. 3032, the plaintiff respectfully petitions this Honorable Court for leave to withdraw the deposit, and interest on same, made in Court by the plaintiff, for the purpose of making a tender of same, to the defendant. The amount of said deposit and interest on same now amounts to $2,124.97.

LLEWELLYN BARTON.

Motion Granted.

SCOTT WILSON,
Justice Supreme Jud. Court.

Mar. 30th, 1921.

44 STATE OF MAINE,
Cumberland, ss:

Motion to Set Proceeding in Error Aside.

Supreme Judicial Court.

In Equity.

No. 3032.

LLEWELLYN BARTON

vs.

HENRY J. CONLEY.

To the Honorable the Justice of the Supreme Judicial Court:

Respectfully represents the undersigned that he is the defendant in the above entitled case or cause of action; that said case has been duly entered in the Law Court of said State; that on March 9, 1921, a certificate of decision was handed down from said Law Court, in said action, which was as follows, that is to say, "Bill sustained, Decree in accordance with opinion;" that on March 28, 1921, the Certificate of decision in said case was received and filed in the office of the Clerk of the Supreme Judicial Court, for the County of Cumberland; that on April 9, 1921, the defendant, Henry J. Conley, filed in the office of said Clerk, a petition for writ of error and assignment of errors, preparatory to having said case removed to the Supreme Court of the United States; that Chief Justice Cornish of said Supreme Judicial Court allowed said petition for writ of error,
45 on condition that the said defendant, Henry J. Conley, file in said case a penal bond in the sum of Five Hundred Dollars ($500.00); that said defendant, Henry J. Conley, seasonably filed said bond; that said bond was duly approved by Chief Justice Cornish of said Court; that subsequently thereto your petitioner discovered that the Certificate of Decision in said action had not been signed, and by reason of the premises, said writ of error was prematurely allowed.

Wherefore, your petitioner prays:

1. That all the proceedings in error, to wit: the petition for writ of error, and the allowance of said writ of error, be set aside and held for naught and that the Court now sign the final decree as provided for by the certificate of decisions made March 9, 1921.

2. And for such other and further relief as may be adequate.

HENRY J. CONLEY,
Defendant.

I hereby consent to the vacation of the proceedings in error above specified and the signing of the decree at this time as above set forth.

SAMUEL J. BATES,
Attorney for Plaintiff.

Dated at Portland, Maine, this 6th day of July, 1921.

Motion granted.

LESLIE C. CORNISH,
Ch. Jus. S. J. C.

46 *Final Decree.*

STATE OF MAINE,
Cumberland, ss:

Docket No. 3032.

LLEWELLYN BARTON

vs.

HENRY J. CONLEY.

Decree After Decision from the Law Court.

In the above entitled cause, a decision having been rendered by the Law Court, upon the defendant's appeal, that the bill be sustained and that a decree be issued in accordance with the opinion from said Law Court in said case; in accordance with said opinion, it is ordered, adudged and decreed as follows, viz:

That the plaintiff's bill be sustained with costs, that the plaintiff may redeem the mortgaged premises upon the payment to the defendant of the sum due on the mortgaged indebtedness; that there is due on the debt secured by the mortgage, including interest to April 2nd, A. D. 1921, the sum of $2,143.55.

That the defendant discharge said mortgage upon the tender or payment to him of said sum on or before said April 2nd.

SCOTT WILSON,
Justice of Supreme Judicial Court.

Dated July 7th, A. D. 1921.

47 STATE OF MAINE:

Law Court.

Bangor, March 8, 1921.

LLEWELLYN BARTON

vs.

HENRY J. CONLEY.

In the above entitled action transferred from the Docket of the Supreme Judicial Court in the County of Cumberland as a case marked "Law,"

It is now ordered, that the Clerk of said Law Court make upon the Docket, under said action, the following entry, and certify the same to the clerk of said Court for the County of Cumberland to wit: Bill sustained. Decree in accordance with opinion.

47½ *Rescript.*

CUMBERLAND COUNTY:

LLEWELLYN BARTON

vs.

HENRY J. CONLEY.

Rescript by Deasy, J.

Chap. 192 of the laws of *1917* requires a mortgagee within thirty days after completion of foreclosure to record in the Registry of Deeds an affidavit setting forth certain facts. The recording of such affidavit is by the Act made a condition upon which the validity of the foreclosure depends. The question involved is whether the Act which was passed in 1917 applies, and whether under the constitution it can effectually apply to a mortgage dated before 1917 and which contains a one year foreclosure covenant in the familiar form.

Held that the Act by its terms purports to apply to all foreclosures begun after its passage without regard to the date of the mortgage foreclosed, and that the one year foreclosure clause is not such a contract as is contemplated and protected by the constitution.

But it is contended that the Act impairs the obligation of the mortgage contract by extending the time, fixed for foreclosure, by the law in force at its date.

Held that the Act relates to the remedy for enforcement of rights.

An Act relating to precedure only may be changed by the Legislature at its will. There is no vested right in any particular remedy.

But a statute relating to remedy may so far affect the remedy as to impair the obligation of the contract, and for that reason be void.

To determine whether a remedy for enforcement of a con-
47¾ tract impairs its obligation as *as* to offend against the constitution, the test is whether the value of the contract is lessened and whether a substantial and efficacious remedy remains.

Applying this test it is apparent that the requirement of the affidavit of foreclosure does not affect the value of a mortgage contract, and it is also apparent that a substantial and efficacious remedy for its enforcement remains.

The Act therefore applies to foreclosurer begun after its passage without regard to the date of the mortgage foreclosed, such application not being in violation of the constitution.

Bill sustained.

CHAS. F. SWEET,
Clerk.

To Linwood F. Crockett, Esq., Clerk of the Supreme Judicial Court — the County of Cumberland.

48 *Docket Entries.*

3032.

LLEWELLYN BARTON

v.

HENRY J. CONLEY.

(To Redeem Mortgage.)

Samuel L. Bates.
Henry J. Conley, pro se.

Jan. T. 1920.—Bill filed and entered Feb. 21, 1920. Subpœna issued returnable April Rules, 1920.

Feb. 23, 1920.—Certificate to Registry of Deeds issued.

(Feb. 21, 1920. The sum of $2,040.00 paid into the Clerk's office. Receipt given.)

Apr. T. 1920.—Apr. 30, 1920. Answer filed.

May 24, 1920.—Motion to amend bill filed. (Wilson, J.) Hearing on motion to amend to be had June 2, 1920 at 2 P. M. Notice to be given deft. by mailing to him, postage prepaid, a copy of motion and this order thereon, 5 days prior to said hearing.

June 2, 1920.—(Wilson, J.) Hearing had on motion to amend. Motion granted. Amendment allowed. Deft. to have leave to amend answer, or file further pleadings.

June 15, 1920.—Motion to amend answer and amendment filed. (Wilson, J.) Amendment allowed on condition that defendant furnish plaintiff's attorney of record with a copy of same, on or before June 16, 1920.

June 16, 1920.—Replication f'd. (Wilson, J.) Hearing had.

July 1, 1920.—Amendment to answer filed.

July 29, 1920.—Findings and Rulings by the Court filed. Bill sustained with costs. Decree to be in accordance with findings.

July 31, 1920.—(Wilson, J.) John H. Pierce, Esq., appointed Special Master. Decree signed, entered and filed.

Aug. 4, 1920.—Report of Special Master filed. (Wilson, J.) Ord'd that hearing be had on acceptance of Master's report on Friday, Aug. 6, 1920, at 1-30 P. M. Notice to be given Respt., by service of copy of report and order thereon 24 hours prior to said hearing.

Aug. 5, 1920.—Service as ord'd proved.

Aug. 6, 1920.—(Wilson, J.) Hearing had on Report of Spec. Master. Master's report accepted. Fees ordered paid from the County Treasury. Order to County Treasurer issued. Objections to the Report of Spec. Master filed.

Aug. 11, 1920.—Tender of $43.80 paid into Court, making the total deposit equal to the sum found due on the mortgage.

Sept. 4, 1920.—Final decree filed. (Notice given.)

Sept. 8, 1920.—Objections to final decree filed.

49 Sept. 9, 1920.—Final decree signed.

Sept. 11, 1920.—Notice given.

Sept. 16, 1920.—Appeal filed.

Jan. T. 1921.—Mar. 9, 1921. Certif. of decis'n recd. from "Law" Clerk of Law Court. "Bill sustained. Decree in accordance with opinion."

Mar. 28, 1921.—Final decree filed.

Mar. 30, 1921.—Motion of Complainant for leave to withdraw deposit and interest on same, for the purpose of making a tender of same to the defendant. (Wilson, J.) Motion granted. Order filed.

Mar. 31, 1921.—Affidavit of Complainant and Order of Court thereon filed. (Copy of same mailed to Respondent, by the Clerk.)

Apr. 9, 1921.—Pet'n for Writ of Error filed.

Assignment of Errors filed by Deft.

(Cornish, C. J.) Allowance of Pet'n for Writ of Error signed and filed.

Defendant to execute a bond in the sum of $500.00.

Bond approved by Cornish, C. J., filed.

Apr. T. 1921.—July 7, 1921. Mot. to set aside proceedings in error and for signing final decree filed. (Cornish, C. J.) Motion granted.

(Wilson, J.) Final decree signed.

July 25, 1921.—Pet'n for Writ of Error, filed.

(Cornish, C. J.) Allowance of Pet'n for Writ of Error signed and filed. Defendant to execute a bond in the sum of $500.00. Assignment of Errors filed.

July 27, 1921.—Bond approved by Cornish, C. J., filed.

49½ STATE OF MAINE,
Cumberland, ss:

Supreme Judicial Court.

Authentication of Record. Writ of Error.

I, Linwood F. Crockett, clerk of said court, do hereby certify that the foregoing pages, numbered from 1 to 49 inclusive, are a true, full and complete transcript of the record and proceedings, in the case of Henry J. Conley, Plaintiff, vs. Llewellyn Barton, Defendant, and also of the opinion of the court rendered therein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Portland, Maine, this September 23, 1921.

[SEAL.] LINWOOD F. CROCKETT,
Clerk Supreme Judicial Court for the County of Cumberland.

50 *Petition for Writ of Error.*

STATE OF MAINE,
Cumberland, ss:

Supreme Judicial Court.

In Equity.

No. 3032.

HENRY J. CONLEY, Plaintiff,

vs.

LEWELLYN BARTON, Defendant.

Petition for Writ of Error.

And now comes Henry J. Conley, plaintiff in the above entitled cause, and hereinafter called the plaintiff, in error, and says that lately, to wit, on March 9th, 1921, the Supreme Judicial Court in and for the County of Cumberland, in said State of Maine, entered final judgment herein, in favor of said defendant, and against the plaintiff in said cause, and that said Court signed the Final Decree which was duly entered in said cause, by reason and in consequence of said judgment, on July 7th, 1921, and in which judgment and the proceedings had prior thereto in said cause, certain errors were committed to the prejudice of the plaintiff in said cause, all of which said errors will more in detail appear by the assignment of errors to be filed with this petition.

Said Supreme Judicial Court is the highest court of said state in which a decision in this cause may be had. In said cause,
50½ rights, privileges and immunities were claimed by said plaintiff in error, under the constitution and statutes of the United States, and the decision of the Supreme Judicial Court of the State of Maine was against the rights, privileges and immunities especially set up and claimed under the constitution, statutes and authorities of the United States.

Wherefore, said plaintiff, in error, prays that a writ of error may issue out of the Supreme Court of the United States, to the end that the errors so complained of, may be corrected, and said judgment reversed, and that a transcript of the record, proceedings and papers in this suit, duly authenticated, may be transmitted to the Supreme Court of the United States; and said plaintiff further prays that an order may issue fixing the amount of a bond.

HENRY J. CONLEY.

Read on application for writ of error July 25th, 1921.

LESLIE C. CORNISH,
Chief Justice, Supreme Judicial Court, State of Maine.

51 *Allowance of Petition.*

STATE OF MAINE,
Cumberland, ss:

Supreme Judicial Court.

In Equity.

No. 3032.

HENRY J. CONLEY, Plaintiff,

vs.

LEWELLYN BARTON, Defendant.

It appearing in the above entitled cause, the validity of Section 4 of Chapter 95 of the Revised Statutes of Maine, being Chapter 192 of the Public Laws of the State of Maine, for the year 1917, was drawn in question, on the ground of said Section 4 being repugnant to Section 10 of Article 1, of the Constitution of the United States, and of the 14th Article of Amendments to the Constitution of the United States, and it further appearing that the decision of the said Supreme Judicial Court was in favor of such their validity, a writ of error as prayed for by said plaintiff, Henry J. Conley, is allowed to said Plaintiff, upon the execution of a bond by said plaintiff to said defendant in the sum of five hundred (500) dollars.

Dated at Augusta, in the County of Kennebec and State of Maine, this 25th day of July, A. D. 1921.

LESLIE C. CORNISH,
Chief Justice, Supreme Judicial Court of the State of Maine.

52 STATE OF MAINE,
Cumberland, ss:

Supreme Judicial Court.

In Equity.

No. 3032.

HENRY J. CONLEY, Plaintiff,

vs.

LLEWELLYN BARTON, Defendant.

Assignment in *Errors.*

And now comes Henry J. Conley, the plaintiff, in error, in the above entitled cause, in which said cause, Llewellyn Barton is defendant, in error, and says that in the records and proceedings of said entitled cause, and also in the rendition of judgment therein, there is manifest error; and with his petition for writ of error, makes and files the following assignment of errors, in the record and proceedings of said cause, to wit:

The Supreme Judicial Court of the State of Maine erred in holding and deciding that Section 4 of Chapter 95 of the Revised Statutes of the State of Maine, being Chapter 192 of the Acts of the Legislature of the State of Maine for the year 1917, and approved
53 April 6, 1917, was valid. Said Court erred in holding and deciding that the authority exercised by said Llewellyn Barton under said Section 4 was valid. Said Court erred in holding and deciding that said Section 4 and the authority exercised thereunder by said Llewellyn Barton were valid. The validity of said Section 4, and of the authority exercised thereunder, by the said Llewellyn Barton, were drawn in question on the ground of their being repugnant to Section 10 of Article 1 of the Constitution of the United States, and of the 14th Article of Amendments to the Constitution of the United States, and the decision of said Supreme Judicial Court was in favor of such their validity. Said errors are more particularly set forth as follows:

First. Said Court erred in refusing to dismiss the complaint in said action, for the reason that said Court had no jurisdiction of said case.

Second. Said Court erred in holding and deciding that said Section Four was applicable to all foreclosure proceedings begun after it took effect, to wit, April 6, 1917.

Third. And that, therefore, the right of redemption of the real estate in question, under the mortgage in question, was extended under said Section Four for a period exceeding one year from the

time that the foreclosure proceedings thereof were begun; Whereas by Section Three of Chapter Ninety-Five of the Revised
54 Statutes of Maine, and by a clause in the said mortgage deed, itself, the time for redeeming the real estate described therein, from the foreclosure of said mortgage, was limited to one year from the time of the commencement of foreclosure proceedings, by any of the methods provided by the law relative thereto, and in force, at the time that said mortgage deed was signed and executed, to wit, on October 14, 1905.

Fourth. Said Court erred in holding and deciding that the right of redemption, under the mortgage in question, was extended under said Section Four, for a period exceeding one year from the time that the foreclosure proceedings thereof, were begun; and also erred in holding and deciding that its said holdings and decisions relative to the extending of the time of redemption of said mortgage, do not abridge the privileges nor immunities of the plaintiff in error, as a citizen of the United States.

Fifth. That upon the trial of said matter at the Nisi Prius Term of the Supreme Judicial Court of the State of Maine, and also at the Law Term of said Court, the defendant and the plaintiff, in error, Henry J. Conley, duly agreed and insisted that said complaint should be dismissed upon the ground that said Section Four,
55 in so far as it assumed to extend the time of the right of redemption of a mortgage, and particularly and especially of the right of redemption of the mortgage in question, was in conflict with, and in violation of, the constitution and statutes of the United States, and, therefore, unconstitutional; and the Court refused to dismiss said complaint.

Sixth. Said Court erred in holding and deciding that the law stated in said Section Four, as applied to the mortgage contract in question, does not impair the obligations of the mortgage contract in question, and is not in violation of the provisions of Section Ten of Article One, of the constitution of the United States.

Seventh. Said Court erred in holding and deciding that said Section Four as applied to the mortgage contract in question, does not deprive the plaintiff, in error, of property without due process of law, and is not in violation of the provisions of Section One of the Fourteenth Article of Amendments to the Constitution of the United States.

Eighth. Said Court erred in holding and deciding that said Section four as applied to the mortgage contract in question, does not deny to the plaintiff, in error, as a person within the jurisdic-
56 tion of the State of Maine, the equal protection of the laws, and is not in violation of the provisions of Section One of the Fourteenth Article of Amendments to the Constitution of the United States.

Ninth. Said Court erred in holding and deciding that the Legislature of the State of Maine, has clearly by implication made said

Section Four, to wit, Chapter 192 of the Acts of the Legislature of the State of Maine, for the year 1917, applicable to all foreclosure proceedings begun after it took effect, to wit, April 6, 1917, regardless of the date of the mortgages foreclosed.

Tenth. Said Court erred in holding and deciding that said Section Four, to wit, Chapter 192 of the Acts of the Legislature of the State of Maine, for the year 1917, is valid.

Eleventh. Said Court erred in holding and deciding that said Section Four, to wit, Chapter 192 of the Acts of the Legislature of the State of Maine, for the year 1917, does not abridge the privileges and immunities of the plaintiff in error, as a citizen of the United States, and is not in violation of the provisions of Section One of the Fourteenth Article of Amendments to the Constitution of the United States.

57 Twelfth. Said Court erred in holding and deciding that said Section Four, to wit, Chapter 192 of the Acts of the Legislature of the State of Maine, for the year 1917, does not deprive the plaintiff in error of property without due process of the law, and is not in violation of the provisions of Section One of the Fourteenth Article of Amendments to the Constitution of the United States.

Thirteenth. Said Court erred in holding and deciding that said Section Four, to wit, Chapter 192 of the Acts of the Legislature of the State of Maine, for the year 1917, is valid, and is not a law made by the State of Maine, in violation of the provisions of Section One of the Fourteenth Article of Amendments to the Constitution of the United States, and is not a law made by the State of Maine, in violation of the provisions of Section Ten of Article One of the Constitution of the United States.

Fourteenth. Said Court erred in holding and deciding that said Section Four, to wit, Chapter 192 of the acts of the legislature of the State of Maine, for the year 1917, is valid, and is not a law made and enforced by the State of Maine, in violation of the provisions of Section One of the Fourteenth Article of Amendments to the Constitut*ui*n of the United States, and is not a law made and enforced by the State of Maine, in violation of the provisions of Section Ten of Article One of the Constitution of the United
58 States.

Fifteenth. Said Court erred in holding and deciding that said Section Four, to-wit, Chapter 192 of the Acts of the Legislature of *of* the State of Maine, for the year 1917, is not a law made by the State of Maine, and abridging the privileges and immunities of the plaintiff in error, as a citizen of the United States.

Sixteenth. Said Court erred in holding and deciding that said Section Four, to wit, Chapter 192 of the Acts of the Legislature of the State of Maine, for the year 1917, is not a law made and enforced by the State of Maine, and abridging the privileges or immunities of the plaintiff, in error, as a citizen of the United States.

Seventeenth. Said Court erred in holding and deciding that by the enactment of said Section Four, to wit, Chapter 192 of the Acts of the Legislature of the State of Maine, for the year 1917, by the Legislature of the State of Maine, the State of Maine is not depriving the plaintiff in error, of property without due process of law.

Eighteenth. Said Court erred in holding and deciding, that by the enactment of said Section Four, to wit, Chapter 192 of the Acts of the Legislature of the State of Maine, for the year 1917, by the Legislzture of the State of Maine, and by the exercise by
59 said Llewellyn Barton of his authority thereunder, the State of Maine is not depriving the plaintiff in error, of property, without due process of law.

Nineteenth. Said Court erred in holding and deciding that by the enactment of said Section Four, to wit, Chapter 192, of the Acts of the Legislature of the State of Maine, for the year 1917, by the Legislature of the State of Maine, the State of Maine is not denying to the plaintiff, in error, as a person within its jurisdiction, the equal protection of the laws.

Twentieth. Said Court erred in holding and deciding that by the enactment of said Section Four, to wit, Chapter 192 of the Acts of the Legislature of the State of Maine, for the year 1917, by the Legislature of the State of Maine, and by the exercise by said Llewellyn Barton of his authority thereunder, the State of Maine is not denying to the plaintiff, in error, as a person within its jurisdiction, the equal protection of the laws.

Twenty-first. Said Court erred in holding and deciding that the possession under the foreclosure proceedings herein mentioned, having taken place on the 20th day of February, 1919, the plain-
60 tiff's right of redemption under the mortgage covenant in the mortgage deed in question, did expire before the commencement of this action, except as said right to redeem is extended by said Section Four, to wit, Chapter 192 of the Acts of the Legislature of the State of Maine, for the year 1917.

Twenty-second. Said Court erred in holding and deciding that said Section Four, to wit, Chapter 192 of the acts of the Legislature of the State of Maine, for the year 1917, requires a Mortgagee within thirty days after the completion of the foreclosure, to record in the Registry of Deeds, an affidavit setting forth certain facts.

Twenty-third. The plaintiff, in error, says that neither at the present time, does any law exist in the State of Maine, nor at the time of the decisions and findings and holdings of said Court in the premises, nor at the time of the date of said mortgage, nor at any other time, has any law existed in the State of Maine, which requires, or did require, a mortgagee within thirty days after the completion of the foreclosure, to record in the Registry of Deeds, an affidavit setting forth certain facts; and that said Court erred in holding

and deciding as stated in paragraph twenty-two herein; and
61 in so holding and deciding the said Court, apparently without warrant nor authority of law, deprived the plaintiff in error, of innumerable privileges and immunities guaranteed to him under the constitution of the United States, and as a citizen of the State of Maine.

Twenty-fourth. The plaintiff in error further says that neither at the present time does any law exist in the State of Maine, nor at the time of the decisions and findings and holdings of said Court in the premises, nor at the time of the date of said mortgage, nor at any other time, has any law existed in the State of Maine, which requires, or did require, a mortgagee within thirty days after the completion of the foreclosure, of the mortgage, to record in the Registry of Deeds, an affidavit setting forth certain facts; and that said Court erred in holding and deciding as stated in paragraph twenty-two herein, and in so holding and deciding, the Court, apparently without warrant nor authority of law, deprived the plaintiff in error, of innumerable privileges and immunities, guaranteed to him under the constitution of the United States, and as a citizen of the United States.

62 Twenty-fifth. Said Court erred in holding and deciding that said Section Four to wit, Chapter 192 of the Acts of the Legislature of the State of Maine, for the year 1917, requires a mortgagee within thirty days after completion of the foreclosure of the mortgage, to record in the Registry of Deeds, an affidavit setting forth certain facts, and that the recording of such affidavit is, by the Act, made a condition upon which the validity of the foreclosure depends.

Twenty-sixth. The plaintiff in error says that the erroneous holding and decision of said Court that, "the recording of such affidavit is by the Act made a condition upon which the validity of the foreclosure depends," deprived the plaintiff in error of innumerable privileges and immunities guaranteed to him under the constitution of the United States, and as a citizen of the State of Maine.

Twenty-seventh. The plaintiff in error says that the erroneous holding and decision of said Court that, "the recording of such affidavit is by the Act made a condition upon which the validity of the foreclosure depends" deprived the plaintiff in error of innumerable privileges and immunities guaranteed to him under the constitution of the United States, and as a citizen of the United States.

63 Twenty-eighth. Upon the trial of said cause in said Court, both at the Nisi Prius Term and at the Law term thereof, the defendant and plaintiff, in error, Henry J. Conley, duly argued and urged and insisted and asked that said Court decide and hold that neither the Common Law, nor the Constitution of the United States, nor the statutes of the United States nor the Constitution of the State of Maine, nor the Statutes of the State of Maine, gives the Legislature of the State of Maine, power to pass a law that the

recording of an affidavit is by the Act made a condition upon which the foreclosure of a mortgage of real estate depends, and the Court refused so to decide and hold.

Twenty-ninth. Said Court erred in holding and deciding that the State of Maine has power to pass a law nullifying the covenants in a mortgage deed of real estate.

Thirtieth. Upon the trial of said cause, in said Court, both at its Nisi Prius Term and at the Law term thereof, the defendant and plaintiff in error, Henry J. Conley, duly argued and urged and insisted and asked that said Court decide and hold that the State of Maine has no power to pass a law nullifying the covenants in a mortgage deed of real estate, and the Court refused so to decide and hold.

64 Thirty-first. Said Court erred in holding and deciding that Section 4 of Chapter 95 of the Revised Statutes of Maine, which is Chapter 192 of the Public Laws of the State of Maine, for the year 1917, nullified all covenants in all mortgage deeds of real estate executed within the State of Maine.

Thirty-second. Upon the trial of said cause in the Supreme Judicial Court of the State of Maine, both at the Nisi Prius Term and at the Law Term thereof, the defendant and plaintiff in error, Henry J. Conley, duly argued and urged and insisted and asked that said Court decide and hold that Section 4 of Chapter 95 of the Revised Statutes of Maine, which is Chapter 192 of the Public Laws of the State of Maine, for the year 1917, does not nullify any covenant in any mortgage deed of real estate, and more especially and particularly, does not nullify any covenants in a mortgage deed which was dated, signed, sealed, executed, delivered and recorded before said law became effective, and the Court refused so to decide and hold.

Thirty-third. Said Court erred in holding and deciding that Section 4 of Chapter 95 of the Revised Statutes of the State of Maine, which is Chapter 192 of the Public Laws of the State of
65 Maine, for the year 1917, approved April 6, 1917, nullified the covenants in a mortgage deed, which was dated, signed, sealed, delivered and recorded, on October 14, 1905.

Thirty-fourth. Upon the trial of said cause, in said Court, both at the Nisi Prius Term and at the Law Term thereof, the defendant and plaintiff in error, Henry J. Conley, duly argued and urged and insisted and asked, that said Court decide and hold, that Section 4 of Chapter 95 of the Revised Statutes of Maine, which is Chapter 192 of the Public Laws of the State of Maine, for the year 1917, approved April 6, 1917, did not nullify the covenants in a mortgage deed which was dated, signed, sealed, delivered and recorded on October 14, 1905, and the Court refused so to decide and hold.

Thirty-fifth. Said Court erred in holding and deciding that Section 4 of Chapter 95 of the Revised Statutes of Maine, which is

Chapter 192 of the Public Laws of the State of Maine, for the year 1917, and approved April 6, 1917, nullifies the covenants in the mortgage deed of real estate, used as an exhibit in the above entitled case or cause of action.

66 Thirty-sixth. Upon the trial of said cause, in said Court, both at the Nisi Prius Term, and at the Law Term thereof, the said defendant and plaintiff, in error, Henry J. Conley, duly argued and urged and insisted and asked that said Court decide and hold that Section 4 of Chapter 95 of the Revised Statutes of Maine, which is Chapter 192 of the Public Laws of the State of Maine, for the year 1917, and approved April 6, 1917, does not nullify the covenants in the mortgage deed of real estate, used as an exhibit in the above entitled case *on* cause of action, and the Court refused so to decide, and hold.

Thirty-seventh. Said Court erred in holding and deciding that, under the constitution of the United States, said Section Four, being Chapter 192 of the Acts of the Legislature of the State of Maine, for the year 1917, can effectually apply to a mortgage deed, dated, signed, sealed, executed, delivered and recorded, before April 6, 1917, the time when said Section Four, to wit, Chapter 192 of the Acts of the Legislature of the State of Maine, for the year 1917, became effective, and which contains a one year redemption covenant to the effect that the mortgagor's right of redemption shall be forever barred at the end of one year from the time of commencement of
67 foreclosure proceedings.

Thirty-eighth. Upon the trial of said cause in said court, both at the Nisi Prius Term, and at the Law Term, thereof, the said defendant and plaintiff, in error, Henry J. Conley, duly *agreed* and urged and insisted and asked that said Court decide and hold that said Section Four, to wit, Chapter 192 of the Acts of the Legislature of the State of Maine, for the year 1917, and approved April 6, 1917, has no application and no relevancy to a mortgage deed dated, signed, sealed, executed, delivered and recorded, before April 6, 1917, the time when said Section Four, to wit, Chapter 192 of the Acts of the Legislature of the State of Maine, for the year 1917, became effective, and which contained a one year redemption covenant to the effect that the mortgagor's right of redemption shall be forever barred at the end of one year from the time of commencement of foreclosure proceedings, and the Court refused so to decide and hold.

Thirty-ninth. Said Court erred in holding and deciding that section Four, being Chapter 192 of the Acts of the Legislature of the State of Maine, for the year 1917, purports to apply to
68 all foreclosures of mortgages of real estate, begun after its passage and approval, without regard to the date of the mortgage foreclosed.

Fortieth: Upon the trial of said cause in said Court, both at the Nisi Prius Term and at the Law Term thereof, the said defendant

and plaintiff, in error, Henry J. Conley, duly argued and urged and insisted and asked that said Court decide and hold that said Section Four, to wit, Chapter 192 of the Acts of the Legislature of the State of Maine, for the year 1917, and approved April 6, 1917, does not apply to all foreclosures of mortgages of real estate, begun after its passage and approval, without regard to the date of the mortgage deed foreclosed, and the Court refused so to decide and hold.

Forty-first. Said Court erred in deciding and holding that the "one year foreclosure clause" in the mortgage deed and exhibited in the above entitled case or cause of action, is not such a contract as is contemplated and protected by the constitution of the United States.

Forty-second. Upon the trial of said cause of action, in said Court, both at the Nisi Prius Term and at the Law Term thereof,
69 the said defendant and plaintiff, in error, Henry J. Conley, duly argued and urged and insisted and asked that said Court decide and hold that the "one year foreclosure clause" in the mortgage deed exhibited in the above entitled case or cause of action is such a contract as is contemplated and protected by the constitution and statutes of the United States, and the Court refused so to decide and hold.

Forty-third. Upon the trial of said cause of action, in said Court both at the Nisi Prius Term and at the Law Term thereof, the said defendant and plaintiff in error, Henry J. Conley, duly argued and urged and insisted and asked that said Court decide and hold that said Section Four, being Chapter 192 of the Acts, of the Legislature of the State of Maine, for the year 1917, has no application and no relevancy to the plaintiff's rights or cause of action herein, and the Court refused so to decide and hold.

Fourty-fourth. That said Court erred in holding and deciding that said Section Four, which is Chapter 192 of the Acts of the Legislature of the State of Maine, for the year 1917, grants to the defendant in error, Llewellyn Barton, additional time beyond the one year, as provided by the law in force at the time that the mortgage
70 was executed, and, also, by the covenants in the mortgage deed, herein, to redeem his equity, as said holding and decision are in violation of the provisions of Section 10 of Article 1 of the Constitution of the United States and of the covenants of the mortgage deed, itself.

Forty-fifth. That upon the trial of said case or cause of action in said Court, the defendant, and plaintiff in error, Henry J. Conley, argued and urged and insisted and asked that the plaintiff and defendant in error, Llewellyn Barton, be estopped by his written contract of consent that the assignors of the defendant and plaintiff in error, Henry J. Conley, take possession of the premises mentioned in the mortgage deed in question, from asserting any claim, title or equity in or to the said premises, after the expiration of one year from the 20th day of February, 1919, and the Court refused so to decide and hold, and erred in not so holding and deciding.

Forty-sixth. At the time of the trial of said case or cause of action in the Supreme Judicial Court of the State of Maine, the defendant and plaintiff in error, Henry J. Conley, argued and urged and insisted and asked that said Court decide and hold, that there
71 is no rule of law in the Common Law of England, nor in the Constitution of the United States, nor in the statutes of the United States, nor in the constitution of the State of Maine, nor in the statutes of the State of Maine, which requires a mortgagee within thirty days after the foreclosure of a mortgage of real estate is completed, to record in the Registry of Deeds, an affidavit setting forth certain facts, and the Court refused so to hold and decide; but, on the contrary, erroneously held and decided, that Chapter 192 of the Acts of the Legislature of the State of Maine, for the year 1917, requires a mortgagee of real estate within thirty days after the foreclosure of the mortgage has been completed, to record in the Registry of Deeds where the mortgage deed is recorded, an affidavit setting forth certain facts; and in so doing, the said Court, apparently without warrent *nor* authority of law, deprived the defendant and plaintiff in error, Henry J. Conley, of innumerable privileges and immunities guaranteed to him under the constitution of the United States, and as a citizen of the United States.

Forty-seventh. That said Court erred in making its said decisions and findings apparently without warrent *nor* authority of law,
72 and that said decisions and findings are, therefore, apparently wholly null and void.

Forty-eighth. That said Court erred in making its said decisions and findings apparently in violation of law; and that said decisions and findings are, therefore, apparently wholly null and void.

Forty-ninth. That said bill of complaint and the matter contained therein, are not sufficient in law to maintain the said action of said Llewellyn Barton against the said Henry J. Conley, because the said bill of complaint is not supported by an affidavit.

Fiftieth. At the hearing of said cause in the Supreme Judicial Court of the State of Maine, the defendant and plaintiff in error, Henry J. Conley, argued and urged and insisted and asked the Court to decide and hold that said bill of complaint and the matter contained therein, are not sufficient in law to maintain the said action of said Llewellyn Barton against the said Henry J. Conley, because the said bill of complaint is not supported by an affidavit, and the Court refused so to decide and hold.

Fifty-first. Said defendant and plaintiff, in error, says that there is also error in this, to wit, that by the record in said cause,
73 it appears that the judgment in the form aforesaid given, was given for the said Llewellyn Barton against the said Henry J. Conley; whereas by the evidence in the case, and by the law of the land, the said judgment ought to have been given for the said Henry J. Conley against the said L-ewllyn Barton.

Fifty-second. At the hearing in the Supreme Judicial Court of the State of Maine, the defendant and plaintiff in error, Henry J. Conley, duly agreed and urged and insisted and asked that said Court decide and hold, that by the evidence in the case, and by the law of the land, the said judgment should be given for the said Henry J. Conley against the said Llewellyn Barton, and the Court refused so to decide and hold.

Fifty-third. The Plaintiff in error further says that the said erroneous acts, doings, decisions and findings, and other errorneous acts, doings, decisions and findings in the premises, of the said Court, unlawfully deprives the plaintiff in error of the ownership, enjoyment, use, profits, rents and income of certain real estate of
74 great value, to wit, of the value of $2,500.

Fifty-fourth. The plaintiff in error further says that on March 9, 1921, the certificate of decision in said cause was handed down by the Law Court of said state; that on March 28, 1921, said certificate of decision was received and filed in the office of the Clerk of the Supreme Judicial Court, for the County of Cumberland; and that the final decree as provided for by the certificate of decisions made March 9, 1921, or the Decree after decision from the Law Court, was signed by said Court, on July 7, 1921.

Fifty-five. That said decisions and findings of said Courts and judges and each of them, denied to the defendant and plaintiff in error, Henry J. Conley, a title privilege and immunity held by the said Henry J. Conley under the constitution of the United States, and as a citizen of the United States.

75 & 76 Wherefore, by reason of said errors, said plaintiff in error, prays that said judgment of the Supreme Judicial Court of the State of Maine against him may be reversed, and that a judgment be rendered in favor of said plaintiff in error, and for his costs.

HENRY J. CONLEY,
Plaintiff in Error.

Read on application for writ of error July 25, 1921.
LESLIE C. CORNISH,
Chief Justice Supreme Judicial Court, State of Maine.

A true copy of Assignment of Errors.
Attest:
[SEAL.] LINWOOD F. CROCKETT,
Clerk.

77 *Bond.*

Know all Men by These Presents that I, Henry J. Conley of Portland in the County of Cumberland, and State of Maine, as principal, and Dennis J. O'Brion and Henry L. Baldwin both of said Portland, as sureties, are held and firmly bound unto Llewellyn

Barton of said Portland, in the full and just sum of Five Hundred ($500) Dollars to be paid to the said Llewellyn Barton, his heirs or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this twentieth — July, in the year of our Lord one thousand nine hundred and twenty-one.

Whereas, lately, to wit, March 9th, A. D. 1921, in a cause pending in the Supreme Judicial Court of the State of Maine, held in and for said County of Cumberland, between Llewellyn Barton, plaintiff therein, and said Henry J. Conley, defendant, and hereinafter called said defendant, judgment was rendered against said defendant; and said defendant having obtained a writ of error and filed a copy thereof in the clerk's office of said Court, to reverse the judgment in said cause, and having had issued a citation directed to the said Llewellyn Barton, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of this obligation is such, that if said defendant shall prosecute his said writ of error, to effect, and answer all costs if he fails to make his plea good; then the above obligation to be void; else to remain in full force and virtue.

78 HENRY J. CONLEY. [SEAL.]
DENNIS J. O'BRION. [SEAL.]
HENRY L. BALDWIN. [SEAL.]

Signed, Sealed and Delivered in the presence of:

FRANCIS W. SULLIVAN,
At to H. J. C. & D. J. O'B.
CHARLES E. GOLDEN, As to H. L. B.

Approved: July 24, 1921.

LESLIE C. CORNISH,
Chief Justice of the Supreme Judicial Court of the State of Maine.

79 UNITED STATES OF AMERICA, *ss:*

[SEAL.]

To Llewellyn Barton, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within Thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Judicial Court of Maine, wherein Henry J. Conley is plaintiff in error and you are defendant in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf. George MacVane, of Naples, a deputy

sheriff in and for he County of Cumberland, State of Maine, is hereby resignated to serve this citation.

Witness, the Honorable Leslie C. Cornish, Chief Justice of the Supreme Judicial Court of Maine, this seventeenth day of September, in the year of our Lord one thousand nine hundred and Twenty-one.

LESLIE C. CORNISH,
Chief Justice of the Supreme Judicial Court of Maine.

80 On this third day of October, in the year of our Lord one thousand nine hundred and twenty-one, personally appeared before me, the subscriber, George MacVane, of Naples, a deputy sheriff, in and for the County of Cumberland, State of Maine, duly authorized, designated and deputized by Hon. Leslie C. Cornish, Chief Justice of the Supreme Judicial Court of the State of Maine, to serve upon the defendant in error, this citation, and makes oath that he delivered a true and attested copy of the within citation to Llewellyn Barton, defendant in error, with all endorsements thereon, at Naples, in Cumberland County, Maine, October 3d, 1921, at 7:30 A. M.

GEORGE MACVANE,
Deputy Sheriff.

Sworn to and subscribed the third day of October, A. D. 1921, before me,

[Seal of George M. Day, Notary Public, Maine.]

GEO. M. DAY,
Notary Public, Cumberland County, Maine.

(My commission expires August 31, 1922.)

Mileage, 22 miles at .10	$2.20
Service	.75
Pd. Notary	.50
	$3.45

$3.45 paid by plaintiff in error.

GEORGE MACVANE,
Deputy Sheriff.

81 UNITED STATES OF AMERICA, *ss:*

[Seal of the District Court, Maine.]

The President of the United States of America to the Honorable the Judges of the Supreme Judicial Court of Maine, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court of Maine before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Llewellyn Barton and Henry J. Conley wherein

was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties,
82 or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said Henry J. Conley as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and accordinig to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the seventh day of September, in the year of our Lord one thousand nine hundred and twenty-one.

GEO. C. WHEELER,
Clerk of the District Court of the United States,
District of Maine.

Allowed by
LESLIE C. CORNISH,
Chief Justice of the Supreme Judicial Court of Maine.

Attest:
[SEAL.] LINWOOD F. CROCKETT,
Clerk.

83 [Endorsed:] Supreme Court of the United States, October Term, 191–. Henry J. Conley vs. Llewellyn Barton. Writ of Error. Filed this 16th day September, 1921. Linwood F. Crockett, Clerk Sup. Jud. Court for the County of Cumberland, Maine.

84 *Certificate of Lodgment. Writ of Error.*

Supreme Judicial Court.

STATE OF MAINE,
Cumberland, ss:

I, Linwood F. Crockett, clerk of the said court, do hereby certify that there was lodged with me as such clerk on July 27, 1921, in the matter of Henry J. Conley versus Llewellyn Barton:—

1. The original bond of which a copy is herein set forth.

2. Two copies of the writ of error, as herein set forth,—one for the defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affied the seal of said court at my office, in Portland, Maine, this September 23, 1921.

[SEAL.] LINWOOD F. CROCKETT,
Clerk Supreme Judicial Court for the County of Cumberland.

85 *Return to Writ or Error.*

Supreme Judicial Court.

STATE OF MAINE,
Cumberland, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Judicial Court of Maine, in the City of Portland, in the County of Cumberland, this September 23, 1921.

[SEAL.] LINWOOD F. CROCKETT,
Clerk Supreme Judicial Court for the County of Cumberland.

Endorsed on cover: File No. 28,534. Maine Supreme Judicial Court. Term No. 579. Henry J. Conley, plaintiff in error, vs. Llewellyn Barton. Filed October 11th, 1921. File No. 28,534.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

NO. 579.

HENRY J. CONLEY, PLAINTIFF IN ERROR.

VS.

LLEWELLYN BARTON.

In Error to the Supreme Judicial Court of the State of Maine.

BRIEF OF PLAINTIFF IN ERROR.

This is a writ of error brought by the defendant (plaintiff in error, herein) to reverse the final Judgment or Decree issued against him, by the Supreme Judicial Court of the State of Maine, Sitting as a Law Court, in the case of Llewellyn Barton vs. Henry J. Conley, and numbered 3032 on the Docket of said Supreme Judicial Court.

The final Judgment or Decree was dated and signed, on July 7, 1921, (R. p. 29).

The only question involved herein, is the validity of defendant in error, the mortgagor, to redeem said real the question is raised by a Bill in Equity brought by Llewellyn Barton, the defendant in error, against Henry J. Conley, the plaintiff in error (and who is also the assignee of said mortgage R. Pp. 25-26) to redeem said real estate from the foreclosure of said mortgage.

The plaintiff in error, claims, that the right of the signee of said mortgage R. pp. 25-26) to redeem said real estate from the foreclosure of said mortgage, is forever barred by the Revised Statutes of the State of Maine, in such cases made and provided, and that the amendment to the Revised Statutes of the State of Maine, by chapter 192 of the Public Laws of the State of Maine, for the year 1917, has no application and no relevancy, to the mortgage deed, herein, and if applied to the foreclosure of the mortgage, herein, would nullify the covenants in said mortgage deed, and, also, that said chapter 192, is in violation of Section 10 of Article 1 of the Constitution of the Unied States—"No State shall pass any Law impairing the obligation of contracts".

FACTS.

The defendant in error executed and delivered to the plaintiff in error's assignors, a Mortgage Deed, on the fourteenth day of October, 1905, containing the covenant following; **"And the said Grantor hereby covenants and agrees with the said Grantee that the right of redeeming the above mortgaged premises shall be forever foreclosed in one year next after the commencement of foreclos-**

ure by any of the methods now provided by law". (R. pp 18-19).

On the twentieth day of February, 1919, plaintiff in error's assignors took possession of the premises in question under a consent in writing, signed by the defendant in error on the fifth day of February, 1919. (R. p. 21) And, by the terms of the covenant in the Mortgage Deed, above set forth, defendant in error's "right of Redemption" became forever foreclosed on the twentieth day of February, 1920.

This action in equity was begun on the twenty-first day of February, 1920, after the defendant in error's right of defeasance had expired, and the plaintiff in error's title to the land in suit had become absolute. (R. p. 31)

These facts, with the exception that defendant in error's "right of redemption" became foreever foreclosed on the twentieth day of February, 1920, were undisputed. The plaintiff in error offered no evidence.

The Court in its Findings and Rulings, ruled as follows:

"Chap. 192, of the Public Laws of 1917, applies to all foreclosure proceedings begun since its passage, that it does not curtail the rights of the mortgagee under mortgages entered into prior to its becoming a law, or essentially impair the mortgage contract. Any change in the Mortgage or statutory period of redemption, or as to the effect of any foreclosure proceedings begun by a holder of a mortgage since this Act took effect, by reason of its provisions, obviously results only through the laches or voluntary act of the holder himself." (R. p. 10).

"The Plaintiff's Bill is, therefore, sustained with costs. The Plaintiff may redeem the mortgaged premises, upon the payment of the amount now due on the mortgage indebtedness, less the rents and profits received by the holder of the mortgage since possession taken, which the Court finds tentatively, according to the computations hereto annexed, which are subject to correction, to be the

sum of $1,774.12, together with legal costs of foreclosure." (R. p. 10)

It will be noted, however, that in its Findings and Rulings, the Court said:

"The question at issue is not wholly free of doubt. Under the usual practice of this Court, however, the course of the Sitting Justice seems clear. The legislature of the State has clearly by implication made this Act applicable to all foreclosure proceedings begun after it took effect. As a single member of this Court, where any doubt exists, we hesitate to declare a solemn act of the legislative branch of our government, contrary to the provisions of either our State or Federal Constitution." (R. p. 10).

These very significant statements made by the Court in its Findings and Rulings in the matter, indicate very strongly, that at the time of making its decree in the matter, the Court was convinced, from the evidence in the case, that it could have very properly decreed that, at the time that these proceedings were commenced, to wit, on the twenty-first day of February, 1920, the right of Llewellyn Barton, the mortgagor and defendant in error, in this action, to redeem said mortgage from the foreclosure of same, had been forever barred.

To the Final Decree, based on the Findings and Rulings herein stated, the Defendant and plaintiff in error, in this action, seasonably appealed. (R. p. 18).

Chapter 192, Laws of 1917, reads as follows:

Possession obtained in either of these three modes, and continued for one year, forever forecloses the right of redemption, provided that an affidavit, signed and sworn to by the mortgagee or by the holder of record of the mortgage, or their legal representatives, is, within three months after the expiration of one year from the taking of such possession, recorded in the registry of deeds where the certificate of foreclosure is recorded: such affidavit shall state the names of the parties to the mortgage, its date the date of the foreclosure, and the place of record of the certificate of foreclosure, and shall state in general terms that the holder of such

mortgage has been in continuous possession for the period of one year after taking of such possession, and that no payment has been made by the mortgagor, mortgagors, assigns, heirs or legal representatives, on the principal sum or interest of the said mortgage, since the taking of such possession, and that the party or parties holding said mortgage during the said one year have not knowingly or intentionally done any act to waive the rights under said foreclosure proceedings. The register of deeds shall record such affidavit and note on the margin of the record of the original mortgage, the place of the record of such affidavit, and the fee for recording such affidavit shall be the same as the recording of a certificate of foreclosure: but the fact that the register does not note the record of such affidavit on the margin of the record of the original mortgage, shall not invalidate the foreclosure proceedings. Any person, persons, firm or corporation, knowingly or wilfully making a false affidavit or a false statement therein, shall be liable in damages in an action on the case, to any party, or the assigns or legal representatives of any party, sustaining damages thereby.

Prior to the Act of 1917, there had been three modes of obtaining possession of real estate, for the purpose of foreclosure, of which one was the mode pursued by the assignor of the plaintiff in error, herein, as assignee of the mortgage, herein, and is as follows, that is to say:

Chapter 95, Section 3, Article 2.

"He" (the mortgagor, or the person holding under him) "may enter into possession, and hold the same by consent in writing of the mortgagor, or the person holding under him."

Sec. 4. "Possession obtained in either of these three modes, and continued for one year, shall forever foreclose the right of redemption."

THE LAW

For the purpose of convenience the assignment of errors will be grouped under three heads, namely:

1. The violation of Section 10, Article 1, of the U. S. Constitution, to wit, the impairment of the obligation of the contract.

2. Depriving the plaintiff in error of his property without due process of Law contrary to the Fourteenth Amendment of the U.S.Constitution.

3. The impairment of the privileges and immunities of plaintiff in error, contrary to the Fourteenth Amendment of the U. S. Constitution.

I

The conveyance to the mortgagee by the mortgagor is ex facie absolute; and could only be altered by the covenant of defeasance in the Mortagge Deed itself. That is elementary.

But, the defendant in error seems to claim by his Bill, that, by a statute legislated after original conveyance to the plaintifi in error's assignors, the covenant of defeasance was extended to a term of fifteen months—might it not be quite as well fifteen years?—in place of the one year granted in the said conveyance.

In the case of Clark vs. Reyburn, 75 U. S. (8 Wall) 321, the Court said:

"IN THIS COUNTRY, THE PROCEEDINGS IN MOST OF THE STATES" ("to foreclose a morgage"), gage"), "AND, PERHAPS, IN ALL THE STATES, ARE REGULATEDBY STATUTE THEREMEDYTHUS PROSCRIBED, ENTERS INTO THE CONVENTION OF THE PARTIES, IN SO FAR THAT ANY CHANGE BY LEGISLATIVE AUTHORITY WHICH AFFECTS ITS SUBSTANTIALLY, TO THE INJURY OF THE MORTGAGEE, IS HELD TO BE A LAW IMPAIRING THE OBLIGATION OF THE CONTRACT 'WITHIN THE MEANING OF THE PROVISIONS OF THE CONSTITUTION,' THE SAME IS TRUE AS TO THE RIGHTS OF THE MORTGAGOR.

Williamson vs. Doe, 7 Black (Ind) 13; Bronson vs. Kinzie, 42 U. S. (1 How) 311.

The sale and right of redemption under a power in a

Mortgage are governed by the law in force at the time the Mortgage was made.

Smith vs. Green, 41 Fed. 456; Haynes vs. Treadway, 133 Cal. 400.

AND PARTIES ARE PRESUMED TO KNOW AND TO MAKE THEIR CONTRACTS WITH REFERENCE TO THE STATE OF THE LAW AT THE TIME.

Howe s. Bradley, 19 Me. 34.

And there are two requisites in a good amendment to a statue. First, it should be good English. Second, it should be loyal to vested rights of contract under the original law. These two requisites are in fact one. For the amendment of a statute cannot be loyal to the spirit of the original, unless it be good English. But loalty to the spirit must frequently involve disloyalty to the letter of the law. Statutory provisions, therefore, regulating redemption, must be strictly complied with.

Doe vs. Littlefield, as adm'r., etc., 99 Me. 317.

In Barnitz vs. Beverly, 163 U. S. 118, 129, 130, reversing 55 Kan. 466, Mr. Justice Shiras, voicing the opinion of a unanimous bench, held, "Under the law, as it existed at the time when the mortgage was made, after a foreclosure and sale of the mortgaged premises, the purchaser was given actual possession as soon as the sale was confirmed and the sheriff's deed issued. Thereafter, the mortgagor or owner had no possession, title, or any right in any way to the premises." Then, after reviewing the earlier case, the learned court concludes: "Under the new law, the mortgagor shall have eighteen months from the date of sale in which to redeem—In other words, the act carves out for the mortgagor or the owner of the mortgaged property, an estate of several months more than was obtainable by him under the former law.—It seems impossible to resist the conviction, that such a change in the law, is not merely the substitution of one remedy for another, but is a substantial impairment of the rights of the mortgagee as expressed in the contract."

When we state that consent is the foundation of all contracts and legal obligations of every kind, we state a proposition often in the mouths of lawyers, but the vast magnitude and importance of which is by no means always apparent, even to them. The doctrine that the free consent of the parties bound, and not the will of any legislator, or the form in which the will is expressed, constitutes the binding element in contracts, flows as an inevitable logical consequence from the doctrine of personal and political freedom. And statutes which attempt, directly or indirectly, to alter or stultify the purposes of a covenant and negative the substance of it, are things beyond the power of any legislature. The mortgagor and mortgagee by this solemn covenant—a part of the body of the Mortgage Deed—came together on the term the mortgagor was to have for redemption—one year from the time of possession taken; and,

"The Moving Finger writes; and, having writ,
Moves on: nor all your Piety nor wit
Shall lure it back to cancel half a line,
Nor all your tears wash out a word of it."

Nor can any legislature by amendment of remedy make provisions that are nullifying.

Stowe vs. Merrill, 77 Me. 550, and cases there cited.

As to "the filing and recording of the affidavits in foreclosure, this is not necessary as against the mortgagor's equity of redemption, which is effectually barred and foreclosed, notwithstanding the fact that the affidavits required by the statute, may not have been made and recorded until fifteen years after the time required by the Statute."

Tuthill vs. Tracy, 31 N. Y. 157; Mowry v Sanborn, 72 N. Y. 534.

It has been held, that a sale made under a foreclosure by advertisement, pursuant to a statute, will bar the equity of redemption, ALTHOUGH THE USUAL AFFIDAVITS MAY NOT BE MADE.———It is said in the case of Mowry vs. Sanborn, that "THE STATUTORY PROOFS OF FORECLOSURE AND SALE ARE TO BE

LIBERALLY CONSTRUED, AND ARE ONLY REQUIRED TO BE CERTAIN TO A COMMON INTEND; AND THAT IF THEY ARE SO, THOUGH TECHNICALLY DEFECTIVE, THEY WILL BE SUFFICIENT."

Tuthill v Tracy, 31 N. Y. 157, see Osborn v Marwin, 12 Hun (N. Y.) 332; Howley vs. Bennett, 5 Paige ch. (N. Y.) 104.

Generally, as to the effect of affidavits in foreclosure proceedings, it may be said: "They are simply evidence of the completion of the proceedings, and are for the benefit of the purchaser at the sale, and may be made at any time after the sale has been completed."

Tuthill v Tracy, 31 N. Y. 157, see Osborn v Marwin, 12 Hun (N. Y.) 332, Howley vs. Bennett, 5 Paige ch. (N. Y.) 104.

The parties to a mortgage may by special agreement, fix the time within which redemption may be made, "and this agreement will be enforced by the court, within the time designated in the contract, even though the time of redemption be different than the time limited by statute".

Davis vs. Doesback, 81 Ill. 393.

One year after February 20th, 1919, the mortgagor's equity was extinguished, and it "should remain absolutely blotted out forever."

Chapin vs. Wright, 41 N. J. Eq. 438; Bates vs Conrow, 11 N. J. Eq. (3 Stock) 137.

The equity of redemption of the mortgagor was extinguished by the possession of the owner of the fee taken by the mortgagor's consent.

Knox vs. Armstead, 87 Ala. 511, 13 Am. St. Rep. 65, 5 L. R. A. 297, 6 So. 311; Willis vs. McIntosh, 1 Ga. Dec. 162; Ballinger vs Bouiland, 87 III. 513, 29 Am. Rep. 69; Werner vs. Heintz, 17 III. 256; Stoddard vs. Forbes, 13 Iowa 296; Lewis vs. Smith, 9 N. Y. 502, 61 Am. Dec. 706; Thompson vs. Paris, 63 N. H. 421; Bennett vs. Austin, 81 N. Y. 308; Beaufort County Lumber Co. vs. Dail, 112 N. C. 350, 17 S. E. 527, denying rehearing in 11 N. C. 120, 15 S. S. 941; Shackley vs. Homer, 87 Neb. 146, 127 N. W. 145; Payne vs. Song-Bell Lumber Co. 9 Okl. 683, 60 Pac. 235; White

vs. Smith, 174 Mo. 186, 735 W. 610. (Sec. 1055).

Such a freclosure extinguished the right of the mortgagor and those claiming under him to redeem.

Thompson vs. Paris, 63 N. H. 421

And after the expiration of the time for redemption, a bill in equity cannot be maintained for a redemption of the mortgaged premises.

Burley vs. Flint, 105 N. S. 247.

The provisions of the statute within which redemption may be made from the lien of a mortgage, must be strictly complied with, by the party seeking to redeem.

Wood vs. Holland, 53 Ark. 69, 135 S. W. 339; Collins vs. Scott, 100 Cal. 446, 34 Pac. 1082; McIllivais vs. Karstens, 152 Ill. 135, 38 N. E. 555; Sutterlin vs. Connecticut Mut. Life ins. Co., 90 Ill. 483; Munn vs. Buyer, 70 Ill, 604; McCagg vs. Heacock, 34 Ill. 476, 85 Am. Dec. 327; Sych vs. Jackson, 28 Ill. 160; Lindsey vs. Delano, 78 Iowa 350, 43 N. W. 218; Hurn vs. Hill, 70 Iowa, 38, 29 N. W. 796; Sterling Mfg. Co. vs. Early, 69 Iowa 94, 28 N. W. 458, Wakefield vs. Rotherhan, 67 Iowa, 444, 25 N. W. 697; Gargon vs. Gargon, 47 Iowa 180; Mayer vs. Farmers' Bank, 44 Iowa 212; Crawford vs. Taylor, 42 Iowa 260; Fluchel vs. Hiatt, 23 Iowa 327, 90 Am. Dec. 440; Sheldon vs. Fruessner 52 Kan 592, 35 Pac. 204; Henkel vs. Mix, 38 Sa. Am. 271; Emmons vs. Van Zee, 78 Mich. 171, 43 N. W. 1100; Newman vs. Socke, 66 Mich. 27, 66 N. W. 27; McHugh vs Wells, 39 Mich. 175; Cates vs. Ege, 57 Minn. 405, 59 N. W. 495; Carroll vs. Rossiter, 10 Minn. 174; Parsons vs. Noggle, 23 Minn. 328; Gordon vs. Lewis, 88 Mo. 378; Reilly vs. Phillips, 4 S. D. 604, 57 N. W. 780; Connecticut Mut. L. Ins. Co. vs. Cushman, 108 U. S. 51, Mason vs. Northwestern Mut. L. Ins. Co., 106 U. S. 163; Burley vs. Flint, 105 U. S. 247; Swift vs. Smith, 102 U. S 442; Ovis vs. Powell, 98 U. S. 176; Allis vs. Northwestern Mut. Life Ins. Co., 97 U. S. 144; Birnil vs. Hartford Fire Ins. Co., 96 U. S. 677; Howard vs. Bugbee, 65 U. S. (24 How.) 461; Simmons vs. Taylor, 38 Fed. 682; Blair vs. Chicago, etc. R. Co., 12 Fed. 750; National Permanent Mut. Benef. Soc. vs. Paper, (1892) 1 Ch. 54.

Redemption will not be allowed when the time allowed for redemption has expired.

Seymour vs. Bailey, 66 Ill. 288.

One seeking to redeem must pay all sums due under the mortgage, and perform all the conditions.

Glidden vs. Andrews, 14 Ala. 733; Andreas vs. Hubbard, 50 Conn. 351; Seymour vs. Davis, 35 Conn. 264; Franklin vs. Gorham, 2 Day (Conn.) 142; Meacham vs. Steele, 93 Ill. 135; Spurgen vs. Adamson, 62 Iowa 861; Douglass vs. Bishop, 23 Iowa 216; Smith vs. Kelley, 27 Me. 237; Dooley vs. Potter, 146 Mass. 148; Lamb vs. Montague, 112 Mass. 352; Merrill vs. Hosmer, 77 Mass. (11 Gray) 276; McCabe vs. Bellows, 73 Mass. (7 Gray) 148; People vs. Fralick, 12 Mich. 235; Johnson vs. Johnson, Walk. (Mich.) 331; Kezer vs. Clifford, 59 N. H. 208; Fletcher vs. Chase, 16 N. H. 42.

The commencement of proceedings to foreclosure a mortgage vests the legal title of the estate absolutely in the mortgagee, subject to the right of the mortgagor, and certain other persons in privity with him, to redeem the premises on terms specified in the statute, and within the time fixed from the date of the foreclosure.

Stoutz vs. Rouse, 84 Ala. 309; Mewburn vs. Bass, 82 Ala. 622; Comer vs. Sheehan, 74 Ala. 452; Cooper vs. Hornsby, 71 Ala. 62.

Under the statute governing the foreclosure of a mortgage requiring the deed given by the sheriff, on sale of the premises to be deposited with the Register of Deeds, and then declaring that unless the premises are redeemed within the time provided by the statute, the deed shall thereupon become operative, and may be recorded, and shall invest in the grantee, all the right and title that the mortgagor had; should redemption not be made within a year from such sale and deposit of the deed, the right of redemption becomes forever barred; and it is not necessary that the deed be actually recorded, in order to bar the equity of redemption.

Sanford vs. Cahoun, 68 Mich, 223; Libby vs. Gibbs. 39 Mich. 394; Wells vs. Atkinson, 24 Minn. 161.

Finally, in considering the effect of this amendment, it is not very difficult to get the facts so co-ordinated-assuming the defendant in error's construction of it, to be the correct one—as to approach the truth. Defendent in error's interest in the mortgaged premises ceased, under the Mortgage Deed, one year after foreclosure was commenced. We cannot get away from the fact that the Legislature has attempted to extend that term or time; and that spells impairment of our contract, which, as we have seen, has long ago been settled, no legislature may do.

The Court cannot shorten the time stated in an express contract between the parties to a mortgage deed. as that would be altering the nature of the contract, to the injury of the maker of note.

Hawshaw vs. McKesson, 66 N. C. 266.

Neither can the Court nor the Legislature by a proviso, lengthen the time so stated, to the injury of the mortgagee.

The mortgagor knew, or was bound to know, whether or not there was then, or had been, a forfeiture of the conditions of the mortgage. He knew, or was bound to know, that the mortgagee, if there was a forfeiture, had a right to enter for conditions broken; that if in possession of the mortgaged premises after such forfeiture, that he might be in for the purpose of foreclosure; and that the County Registry of Deeds would disclose whether he had entered under the statute to foreclose or not. It, therefore, was for the mortgagor to examine the registry after forfeiture, not for the mortgagee to serve him with notice of what he had done, or of the certificate on record.

In Hobbs vs. Fuller, 9 Gray 98, the facts were like those of the case at bar. "The possession taken by the defendant," observed Justice Thomas, "was in conformity with the provisions of the statutes, and there is no

evidence from which a waiver of his possession could have been inferred."

Our statutes, Chapter 95, Section 3, provides that an entry by a mortgagee for the purpose of foreclosure by consent in writing of the mortgagor, upon mortgaged premises, made, has the effect of barring the right of redemption in the mortgage after the expiration of one year.

And this means, we contend, the statutes as they existed at the time that the mortgage was made and executed.

"I hereby give to John Storer, assignee of the within mortgage, peaceable and open possession of the within described premises, and for the purpose of foreclosing the same."

This transaction was a short time prior to the operation of R. S. of 1841, and must be controlled by the statute of 1821. C, 39, and the additional Act of 1839. C. 372, then in force.

Storer vs. Little, 41 Me. 71.

We contend that as the mortgage in the case at Bar was made and executed many years before the laws of 1917 were enacted, all acts and things done in relation thereto, are controlled and governed by the law as it existed at the time that the mortgage was made and executed, and not by the Legislatitve Act of 1917.

In Proprietors Kennebec Purchase vs. Laboree, 2 Me. 275, the subject of the power of the Legislature to pass retrospective laws which impair vested rights, or create personal liabilities, was elaborately discussed by Chief Justice Mellen, and it was then held that the constitution secured the citizens "against the retroactive effect of legislation upon their property." And in regard to the question as to what is a retrospective law thus unconstitutional, the Court adopted the definition of Justice Story, "A STATUTE WHICH CREATES A NEW OBLIGATION, OR IMPOSES A NEW DUTY."

This was so decided in the Massachusetts case of

Gray vs. Coffin, 9 Cush. 192. See also Medford vs. Leonard, 16 Mass. 215; Coffin vs. Rich, 45 Me. 514, 515.

The Court, in the case of Proprietors Kennebec Purchase vs. Laboree, said;

"The section is certainly retrospective as well as prospective. It professes to establish principales by which causes then pending, as well as those which might in future be commenced, should be decided. It professes to operate on past transactions, and to give to facts a character which they did not possess at the time they took place and to declare, that, in the trial of causes depending on such facts, they shall be considered and allowed to operate in the decision of such causes, according to their new character. It professes to settle rights and titles depending on laws as they existed for a long term of years before the act was passed, by new principles, which, for the first time, are introduced by its provisions. It professes to change the nature of a disseisin, and thereby subject the true owner of lands to the loss of them, by converting into a disseisin by mere legislation, those acts which, at the time the law was passed, did not amount to a disseisin. It professes to punish the rightful owner of lands, by barring him of his right to recover the possession of them, when, by the existing laws, he was not barred, nor liable to the imputation of any laches for not sooner ejecting the wrongful possessor. It is true, that there is no express provision in our constitution, as there is in that of New Hampshire, by which the legislature are prohibited from enacting retrospective laws, though, upon examination, we apprehend it will be found to contain provisions which were intended to be, and must be considered as, prohibitions. These will be presently noticed. In the case of Fletcher vs. Peck, 6 Cranch, 87, C. J. Marshall, in pronouncing the opinion of the Court, says, 'It may be well doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where they are to be found, if the property of an individual fairly and honestly acquired, may be seized without compensation?' When speaking of the act of Georgia, he observes, 'The validity of this

rescinding act, then, might well be doubted, were Georgia a single soverign power. But she is a part of a large empire. She is a member of the American Union; and that Union has a Constitution which declares that no state shall pass a law impairing the obligation of contracts.' He afterwards adds, 'The estate having passed into the hands of a purchaser, for a valuable consideration, without notice, the State of Georgia was restrained, either BY GENERAL PRINCIPLES WHICH ARE COMMON TO ALL OUR FREE INSTITUTIONS, OR BY THE PARTICULAR PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES.' In the case of Society, etc. vs. Wheeler, 2 Gal. 105, Justice Story in delivering his opinion says: "Upon principle, every statue which takes away or impairs vested rights, acquired under existing laws, OR CREATES A NEW OBLIGATION, IMPOSES A NEW DUTY, OR ATTACHES A NEW DISABILITY IN RESPECT TO TRANSACTIONS OR CONSIDERATIONS ALREADY PAST, must be deemed retrospective; and this doctrine seems fully supported by authorities. "He cites Calder vs. Bull, 3 Dall, 386, and Dash vs. Van Kleck, 7 Johns, 477, and then adds, "The reasoning in these authorities, as to the nature, effect, and injustice in general of retrospective laws, is exceedinly able and cogent, and in a fit case" "depending on elementaryprinciples. I should be disposed to go a great waywith the learned argument of Chief Justice Kent.' It was not necessary in that case, to decide on elementary principles, in consequence of the provision in the constitution of New Hampshire, respecting retrospective laws, to which we have before alluded. We will not cite passages from the opinion of the Court in Dash vs. Van Kleck. The whole case is full of learning upon the subject now under consideration. See also King vs. Dedham Bank, 15 Mass. 447; Medford vs. Learned, 16 Mass. 215; Foster vs. Essex Bank, 16 Mass. 245."

Where the right of redemptjon is lost by laches in failing to redeem within the time specified,

McNess vs. Swaney, 50 Mo. 388; Chapin vs. Wright, 41 N. J. Eq. (14 Stew.) 438; Elmendorf vs. Taylor, 23 U. S. (10 Wheat) 152; Cholmondeley vs. Clinton, 2 Jac. &

W. 1, it cannot be revived by a tender of the amount of the mortgage and interest, and a demand for possession of the premises.

Miner vs. Beckman, 11 Abb. (N. Y.) Pr. N. S. 147, 42 How. (N. Y.) Pr. 33.

Where there is a merger of the equity of redemption in the legal estate, the right of redemption is extinguished.

Knowles vs. Lawton, 13 Ga. 476.

After the expiration of the statutory time for redemption, a Bill in Equity cannot be maintained for a redemption of the mortgaged property.

Burley vs. Flint, 105 U. S. 247.

In the form of mortgage generally used in the various States, there are provisions under which the mortgage may be foreclosed for the whole debt, on the breach of a single condition or **covenant.**

Holden vs Gilbert, 7 Paige Ch. (N. Y.) 208; McLean vs. Presley's Admrs., 56 Ala 211; Poper vs. Durant, 26 Iowa 233; Bushfield vs. Meyer, 10 Ohio St. 334; Hosie vs. Gray, 71 Pa. St. 198; First Nat. Bank vs. Citizens' Bank, 11 Wyo. 32.

Such a stipulation may be contained either in the mortgage or note which it secures.

San Gabriel Valley Bank vs. Lake View Town Co., 59 Pac. 360 (Cal.); Fox vs. Gray, 105 Iowa 433; Brewer vs. Penn. Mut. Life Ins. Co. 94 Fed. 347; Farnsworth, vs. Hoover, 86 Ark. 367; Kleinsorge vs. Kleinsorge, 133 Cal. 412.

THE PARTIES TO A MORTGAGE CAN LAWFULLY AGREE TO SUCH CONDITIONS.

(Curran vs. Houston, 201 Ill. 442.)

AND WHEN THEY DO SO, THE CONDITIONS WILL BE ENFORCED BY COURTS OF EQUITY.

Richard vs. Holmes, 59 U. S. (18 How.) 143; Hotchorn vs. Louis, 170 N. Y. 576; Connecticut Mut. Life Ins.

Co. vs. Westerhoff, 58 Neb. 379; Cole vs. Hinck, 120 App. Div. 355; Smith vs. Lamb, 59 Misc. 568.

We respectfully submit the following Federal case to support our contention that, without regard to any existing equilties between the original parties to a mortgage deed, the Legislature cannot pass a law changing or nullifying the covenants, nor of any of them, in a mortgage deed.

Sweet vs. Stark, 31 Fed. 858.

Neither can the court nor the legislature lengthen the time stated in an express contract between the parties to a mortgage deed, relative to the time of foreclosure as stated in the mortgage deed, relative to the time of foreclosure as stated in the mortgage deed, itself, and in the law as it existed at the time that the mortgage was executed, as that would be altering the nature of the contract, to the injury of the mortgagee. And this cannot be done by indirection—adding a proviso which, in effect, changes the covenant.

In most, if not all the states, proceedings to foreclosure the equity of redemption of the mortgagor and those claiming under him, are regulated by statute, AND THOSE REGULATIONS ARE A PART OF THE CONTRACT.

Smith vs. People' Bank, 24 Me. 189, 193; Abraham vs. Chenoweth, 9 Creg. 348, 351; Walker vs. King, 44 Vt. 601, 612; Peugh vs. Davis, 96 U. S. 337; Clark vs. Reyburn, 75 U. S. (8 Wall.) 321.

A stipulation in a mortgage permitting foreclosure for the whole debt on the breach of a single condition or covenant, is not regarded as a penalty, but as a provision for the earlier maturing of the debt, upon the happening of certain contingencies.

Richmond vs. Holmes, 59 U. S. (18 How.) 143.

Where the mortgage contains a stipulation, providing that the whole debt shall become due at the option of the mortgagee, in case of failure to make punctual payments, the Court can not relieve the mortgagor from his defaults, even on the payment of the instalments due

with costs, but is bound to give effect to the bond and mortgage according to its provisions and the election of the mortgagee.

Bennett vs. Stevenson, 53 N. Y. 508; Ferris vs. Ferris, 28 Barb. (N. Y.) 29.

ONE SEEKING TO REDEEM MUST PAY ALL SUMS DUE UNDER A MORTGAGE, AND PERFORM ALL THE CONDITIONS.

Smith vs. Kelley, 27 Me. 237: Dooley vs. Potter, 146 Mass. 148; Lamb vs. Montague, 112 Mass. 352; Merrill vs. Hosmer, 77 Mass. (11 Gray) 276; McCabe vs. Bellows, 73 Mass. (7 Gray) 148.

After the expiration of the statutory time for redemption, a Bill in Equity cannot be maintained for a redemption of the mortgaged property.

Burley vs. Flint, 105 U. S. 247; Seymour vs. Bailey, 66 Ill. 288.

"The obligations of contracts, which are protected from impairment by the State and Federal Constitutions. do not arise wholly from the acts and stipulations of the parties, independent of existing Law.

"This obligation has vitality and subsists outside the stipulation expressed by the parties in the contracts.

"The Laws which exist at the time and place of making the contract enter into and form a part of it, as if they were expressly referred to or incorporated into it.

"While the State may to a certain extent and within proper bounds, regulate the remedies, yet, if by a subsequent enactment, it so changes the nature of the remedies as to **materially impair the rights and interests of a party to a contract,** this is as much a violation of the compact, as if it absolutely destroyed the rights and interest.

"The Constitutional Prohibition secures from attack, not merely a contact itself, but all the essential in-

cidents which render it valuable and enables its owner to enforce it.

It is not within the power of a State to pass a law which changes the covenants in a deed.

Chapter 192 of the Public Laws of 1917, held to be unconst tutional, so far as it applies to mortgages in existence prior to its enactment."

Phinney vs. Phinney, 81 Me. 450, citing Vor Hoffman vs. City of Quincy, 4 Wall. 550; Edwards vs. Kearzey, 96 U. S. 600; Planters' Bank vs. Sharp, 6 How. 299; La. vs. New Orleans, 102 U. S. 206; Green vs. Biddle, 8 Wheat 84; Bronson vs. Kinzie, 1 How. 310.

Chapter 95 Section 7, of the Revised Statutes of 1916, of Maine, reads as follows:

"The mortgagor or person claiming under him, may redeem the mortgaged premises within one year after the first publication or the service of the notice mentioned in section five, and if not so redeemed his right of redemption is forever foreclosed."

The defendant in error does not bring himself within Section 15, of Chapter 95, of the Revised Statutes of 1916, of Maine, because he did not perform or tender performance of any of the conditions of the mortgage, and did not offer to pay any sum which was found to be due on said mortgage, nor perform any of the conditions of said mortgage, until February 21, 1920—ONE DAY AFTER THE RIGHT OF EXDEMPTION HAD EXPIRED—although the plaintiff in error, as assignee of said mortgage, duly and seasonably rendered to said defendant in error, as mortgagor, therein, a true account of the sum due upon the said mortgage, and of the rents and profits, and of the money expended in repairs and improvements to wit, on January 17, 1920. (R. p p p. 22-23-24), when, by that section, all of said acts and things on the part of the defendant in error, as mortgagor, should have been done, and performed on or before February 20, 1920.

Chapter 95, Section 15, of the Revised Statutes of 1916 of Maine, reads as follows:

Any mortgagor, or other person having a right to redeem lands mortgaged, may demand of the mortgagee or person claiming under him, a true account of the sum due or the mortgage, and of the rents and profits, and money expended in repairs and improvements, if any: and if he unreasonable refuses or neglects to render such account in writing, or, in any other way by his default, prevents the plaintiff from performing or tendering performance of the condition of the mortgage, he may bring his Bill in Equity for the redemption of the mortgaged premises, within the time limited in section seven, (herein quoted) and therein offer to pay the sum found to e equitably due, or to perform any other condition, as the case may require, and such offer has the same force as a tender of payment or performance before the commencement of the suit; and the bill shall be sustained without such tender, and thereupon he shall be entitled to judgment for redemption and costs.

Chapter 82, Section 6, Article 1, of the Revised Statutes of 1916, of Maine, leads as follows:

The Supreme Judicial Court of Maine, "has jurisdiction" in "cases for the foreclosure of mortgages of real and personal property, and for redemption of estates mortgaged." The modes of foreclosure and the proceedings for redemption are prescribed by Revised Statutes. 1916, Chap. 95. The modes of redemption then established, embrace all the authority conferred upon this Court, in reference to this subject—matter. It would be absurd to hold that the Legislature specially determined the proceedings to be had for the foreclosure and redemption of mortgaged estates, and yet by a general clause established not merely those thus designated, but the whole course of procedure as existing in a court of general equity jurisdiction. It has been repeatedly held that the powers of said Court are limited and restricted by statute, under and through which alone, it derives its authority in reference to the redemption of mortgages. "As to suits for redemption," remarks Whitman, C. J., in Shaw vs. Gray, 23 Me. 174, "the power delegated must have reference to the modes of proceedings particularly prescribed for the purpose."

French vs. Sturtevant, 8 Greenl. (Maine) 246; Chase vs. Palmer, 25 Me. 341.

The defendant in error, therefore, to enable him to maintain his bill, must bring his case within the provisions of Revised Statutes of 1916, Chapter 95, of Maine. His case is not with section 15 because there has been no tender on the part of the mortgagor, and no performance or tendering performance within the period of one year from the date of the commencement of foreclosure, as required by section seven of said chapter, (herein quoted) nor refusal on the part of the mortgagee, or person claiming under him, to render an account upon request, nor any negligence or delay in accounting, but, on the contrary, the mortgagee, and persons claiming under him, did render an account, upon request, and with negligence nor delay in accounting, to wit, and on January 17, 1920 (R. p. p. p. 22-23-24.

The amendment provided by Chapter 192, Laws of 1917, of Maine, has no application and no relevancy to the case or cause of action, herein, nor to the parties to said mortgage deed, as the provisions of said amendment are simply evidence of the completion of the proceedings and concern only future purchasers, and the affidavit mentioned therein, may be made any time after the sale has been recorded, as has been held in Tuthill vs. Tracy, 31 N. Y. 157; Osborn vs. Marwin, 12 Hun. (N. Y.) 332, and Howley vs. Bennett, 5 Paige Ch. (N. Y.) 104 already cited herein.

The defendant in error having failed to show a compliance with the provisions of Chapter 95, of the Revised Statutes of 1916, and the Court having limited jurisdiction, within which the plaintiff has not brought his case, the bill cannot be maintained.

See Brown vs. Snell, 46 Me. 496.

Chapter 95 of the Revised Statutes of 1916, provided five different methods by which a mortgage may be foreclosed, and under each method, one year from the commencement of the proceeding is allowed the ower of the equity of redemption in which to redeem, and says that if the mortgage is not redeemed within the design-

ated year, the right of redemption is forever foreclosed. It would be strange if the legislature by its legislative acts, could single out one of those methods of redemption, and say that under that method of redemption, the owner of the equity of redemption should have fifteen months in which to redeem, and under the other four methods, he should have only one year.

We, therefore, claim that the amendment made to Section 4 of Chapter 95 of the Revised Statutes of 1916, of Maine, by Chapter 192 of the Public laws of A. D. 1917, is clearly and beyond a preadventure of a doubt, and unquestionably, unconstitutional, if it works as the defendant in error contends it does to change the date of the bar of the defendant in error's equity of redemption in the mortgage in this case, because under the law as it existed when the mortgage now under consideration was made, about fifteen years ago, (and which contains a clause which reads as follows, that is to say, "AND THE SAID GRANTOR HEREBY COVENANTS AND AGREES WITH THE SAID GRANTEE THAT THE RIGHT OF REDEEMING THE ABOVE MORTGAGED PREMISES SHALL BE FOREVER FORECLOSED IN ONE YEAR NEXT AFTER THE COMMENCEMENT OF FORECLOSURE BY ANY OF THE METHODS NOW PROVIDED BY LAW", after the commencement of foreclosure by the method under which this mortgage was foreclosed, the mortagee and those claiming under him, were given actual fee as soon as the year allowed by law for redemption, as provided by the statute of this State for the redemption of real estate from the foreclosure of mortgages, as it existed at the time that the mortgage now under consideration was executed on October 14, 1905, had expired; and which year expired, as is evienced by the records of the Registry of Deeds of this County, and also by the defendant in error's admission on the trial of this action, on the twentieth day of February, D. 1920.

Thereafter the mortgagor or owner had no possession, title or right in any way to the premises.

Where a party claims title to real estate by statute provisions, he must show, in order to succeed, a strict compliance with such provisions.

Storer vs. Little, 41 Me. 96. Doe vs. Littlefield, as Admr. etc. 99 Me. 317.

Although the Court has, by statute, power to hear and determine as a Court of equity, all suits for the redemption and foreclosure of mortgaged estates, its powers are limited and restricted to the modes of redemption prescribed by law, and, where a party fails to comply with the statute provisions, the Court can afford him no relief under its general powers as a Court of Equity.

Brown vs. Snell, 46 Me. 490; Doe vs. Littlefield, as Admr., etc., 99 Me. 317; Mason vs. Northwestern Mut. Life Ins. Co., 106 U. S. 163; Burley vs. Flint, 105 U. S. 247; Swift vs. Smith, 102 U. S. 442; Ovis vs. Powell, 98 U. S. 176; Allis vs. Northwestern Mut. Life Ins. Co., 97 U. S. 144; Birnie vs. Hartford Fire Ins. Co., 96 U. S. 677; Howard vs. Bugbee, 65 U. S. (24 How.) 461; Simmons vs. Taylor, 38 Fed. Rep. 682; Blair vs Chicago. etc., R. Co., 12 Fed. Rep. 750; Connecticut Mut. Life Ins. Co., vs. Cushman, 108 U. S. 51.

Laches by the mortgagee or those claiming under him cannot enter into the matter of foreclosure of a mortgage of real estate and the redemption of real estate.

McPherson vs. Hayward, 81 Me. 336; Munro vs. Barton, 98 Me. 254.

It is immaterial whether the affidavit was not recorded by reason of "the laches or voluntary act of the holder" of the mortgage, or not, as it may be recorded fifteen years after the mortgage was signed and executed. The fact that the affidavit has not been recorded by reason of the voluntary act of the mortgagee or those claiming under him, does not affect the validity of the foreclosure of the mortgage.

Tuthill vs. Tracy, 31 N. Y. 157; Mowry vs Sanborn, 72 N. Y. 534.

The filing and recording of affidavits in foreclosure proceedings is not necessary as against the equity of redemption, which is effectually barred and foreclosed notwithstanding the fact that the affidavits required by the statute may not have been made and recorded until fifteen years after the time required by statute.

Tuthill v Tracy, 31 N. Y. 157; Mowry v Sanborn, 72 N. Y. 534.

In the Interest of the economy the questions raised in the 2nd and 3rd subdivision will be treated very briefly. They are so interwoven with the impairment of the obligation of the contract that it is respectfully requested that the Court consider the cases cited in support of the impairment of the obligation of the contract in this behalf.

The plaintiff in error is deprived of his property without due process of the Law.

Bronson vs. Kinzie, 1 How. 311 1 1 1. Ed. 143: How. ard vs. Bugbee, 24 How. 461, 16 L. Ed. 753; Barnitz vs. Beverly 163 U. S. 118.

The provisions of the Laws in existence at the time of making the contract are as complete a part of the contract as though they had been written therein.

White vs. Hart 13 Wall. 653, 30 L. Ed. 688. Rees vs. Watertown 19 Wall, 107; Toledo D. and B. R. Coe vs. Hamilton, 134 U. S. 301, 33 L. Ed. 908. East Tenn. V. and G. R. Coe vs. Frazir, 139 U. S. 288, 35 L. Ed. 196 Gunn vs. Barry, 82 U. S. 610, 21 L. Ed. 212.

Brines vs. Hardford F. Ins. Co., 96 U. S. 637, 4 L. Ed. 362.

If the defendant in error's contention is accurate, the estate pledged in his mortgage and the one disposed of under the foreclosure, differ.

The mortgage pledges an indefeasible estate of in-

heritance, yet it really disposes of but a remainder, subject to possession for 15 months (not 12 months as provided in the mortgage contract and by law in existance at the time of the making of the mortgage) of another person, who is under no obilgation to pay rent or account for proceeds. Such a change in the law is not merely the substitution of one remedy for another, but **is a substantial impairment of the rights of the mortgagee as expressed in the contract.**

Barnitz vs. Beverly, 163 U. S. 118.

Respectfully submitted,

H. A. Hegarty

J. B. Flynn

No. 198

Supreme Court of the United States

OCTOBER TERM, 1921

HENRY J. CONLEY, Plaintiff in Error

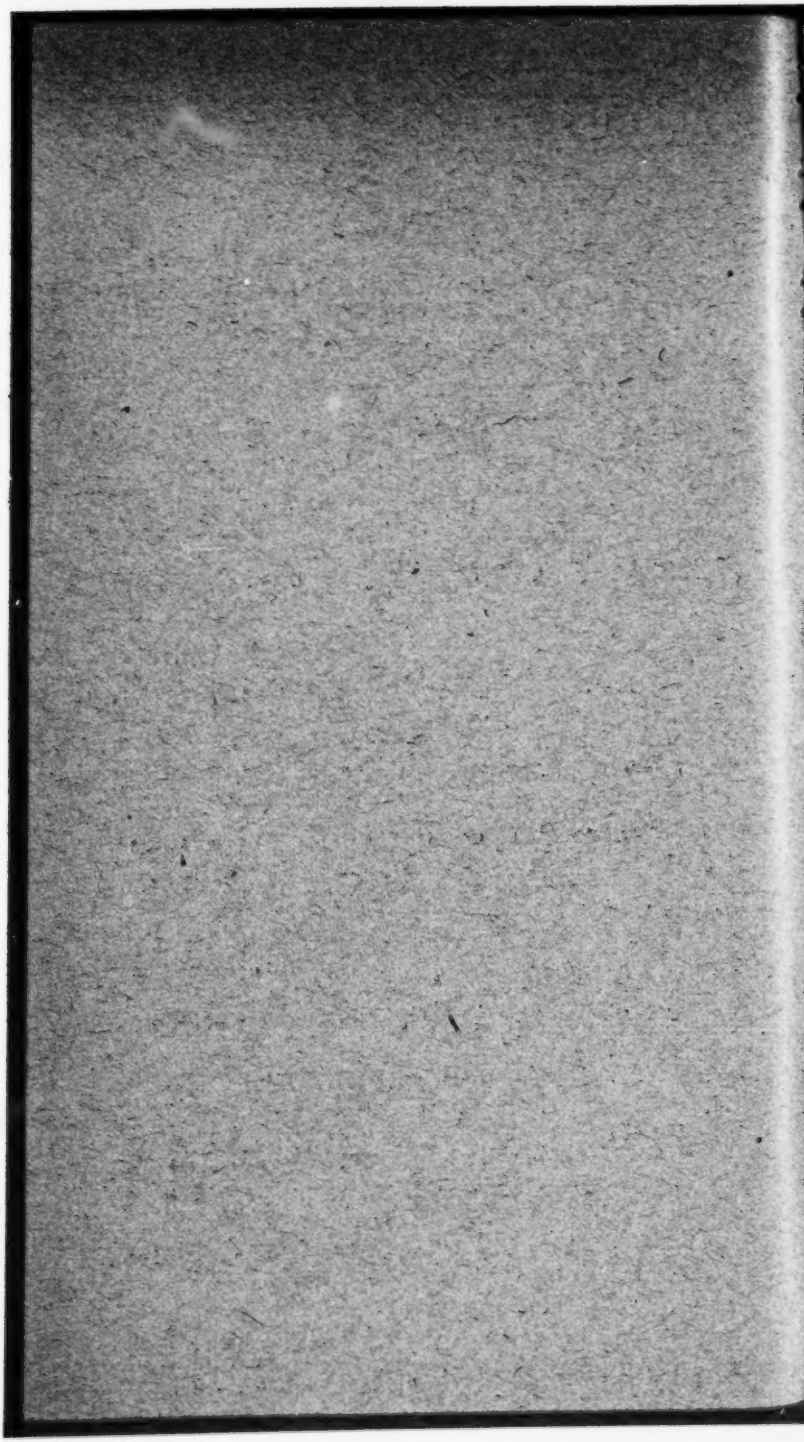
VS.

LLEWELLYN BARTON

In Error to the Supreme Judicial Court of the State of Maine

BRIEF OF DEFENDANT IN ERROR

FRANK H. HASKELL
Of the Maine Bar



Supreme Court of the United States

OCTOBER TERM, 1921

HENRY J. CONLEY, Plaintiff in Error

vs.

LLEWELLYN BARTON

In Error to the Supreme Judicial Court of the State of Maine

BRIEF OF DEFENDANT IN ERROR

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Of the Maine Bar

This is a writ of error brought by the plaintiff, Henry J. Conley, to reverse final decision against him by the Supreme Judicial Court of Maine, sitting as a Law Court, in the case of Barton v. Conley, numbered 3032 on Supreme Judicial Court Docket of Cumberland County, Maine.

The only question at issue is whether the Act (Chap. 192, Public Laws of Maine, 1917) violates the provisions of Article 1, Section 10, and the fourteenth Amendment to the Federal Constitution.

FACTS.

On October 14, 1905, the defendant in error executed a mortgage of his real estate to the assignors of the plaintiff in error in the usual form.

At that time three methods of foreclosure of mortgages of real estate were provided by the laws of the State of Maine. (Chap. 95, Secs. 3 and 4, R. S. Maine, 1916.)

In 1917 the legislature of the State amended the act relating to the foreclosure of mortgages by adding to Section 4 a provision for the execution and recording of an affidavit within three months after the expiration of one year from the date of the commencement of the foreclosure. (Chap. 192, Laws of 1917 of Maine.)

On the twentieth day of February, 1919, the assignors of the plaintiff in error took possession of the real estate described in said mortgage under a consent in writing, as provided by the second method of foreclosure, and subsequently assigned and transferred to the plaintiff in error the said mortgage, subject to redemption according to law.

The Supreme Judicial Court of Maine, sitting as a Law Court and being the highest appellate court of the State, decided that the plaintiff in error had not conformed with the terms of the statute and that his foreclosure proceeding was null and void ab initio.

The plaintiff in error in this present proceeding raises constitutional question that the amendment of 1917 is in contravention of Article I, Section 10, and the fourteenth Amendent to the Constitution of the United States. If

the amendment is unconstitutional, the foreclosure of the plaintiff in error became effective on the twenty-first day of February, 1920. If such amendment is constitutional, then by the terms of the amendment his foreclosure proceedings were rendered null and void by his failure to file within three months the affidavit required thereby.

This is the sole question involved.

ARGUMENT.

The contention of defendant in error is:

1st. That the right of foreclosure is a statutory right, not a contractural one, and depends upon the provisions of positive law.

2d. That the Act of 1917 relates only to the remedy of procedure in the foreclosure of a mortgage which may be changed by the legislature at will.

3d. That said act does not impair the rights of the plaintiff in error, because it does not lessen the value of his contract and a "substantial and effective remedy" remained after its enactment.

These contentions are supported and upheld by the Court at Nisi Prius, in the original suit (p. 9 R) and confirmed and decreed by the decision of the Law Court (119 Maine, 581), as well as by the cases and decisions herein cited.

In support of contention No. 1, the following cases are cited:

Anderson v. *Anderson* (1891) 28 N. E. 35; 129 Ind. 573; 28 Amer. St. Rep. 211.

Heitch v. *Minnesota Threshing Machine Co.* (N. D. 1914) 150 N. W. 457.

Stafford v. *Morse*, 97 Maine, 223.

Jones v. *Bowler* et al., 74 Maine 311 and cases cited.

Edwards v. *Johnston* (1886) 5 N. E. 716; 105 Ind. 594.

Butler v. *Palmer* (N. Y. 1841) 1 Hill, 325.

Planters' Bank v. *Sharp*, 6 Howard, 301.

In support of contention No. 2, the following cases are cited:

Sturges v. *Crowninshield*, 4 Wheaton 122 and cases cited.

Bank of Columbia v. *Oakley*, 4 Wheaton 235.

Antoni v. *Greenhow*, 107 U. S. 769, 2 Sp. Ct. Rep. 91.

Bronson v. *Kinzie*, 1 Howard 311.

Cairo & F. R. Co. v. *Hecht*, 95 U. S. 168.

Hill v. *Merchants' Mutual Insurance Co.*, 134 U. S. 515, 10 Sp. Ct. Rep. 589.

Tennessee v. *Sneed*, 96 U. S. 67 and cases cited.

Kennebec R. R. Co. v. *Portland R. R. Co.* 59 Maine 9.

Poore v. *Chapin*, 97 Maine, 304.

Henley v. *Myers*, 215 U. S. 373.

In support of contention No. 3, the following cases are cited:

Vance v. *Vance*, 108 U. S. Rep. 514 and opinions cited.

Memphis v. *United States*, 97 U. S. 293.

Tennessee v. *Sneed*, 96 U. S. 69, 24 L. Fed. and cases cited.

Edwards v. *Kearzey*, 96 U. S. 595.

McGahey v. *Virginia*, 135 U. S. 662, 10 Sup. Ct. Rep. 972.

King v. *Missouri*, 107 U. S. 221, 2 Sup. Ct. Rep. 443.

State Savings Bank v. *Matthews* (1900) 81 N. W. 918; 123 Mich. 56; 6 Det. Leg. N. 956.

Northwestern Mutual Life Insurance Co. v. *Neeves* (1879) 46 Wis. 147; 49 N. W. 832.

The defendant in error respectfully submits that the case of *Barnitz* v. *Beverly,* 163 U. S. 118, 129, 130, while stating well recognized and settled law in Federal and state courts, so far as known, is not applicable to this controversy.

In the case at bar, the time for redeeming the mortgaged premises is not, by the statute, extended or enlarged a single day. It does not purport to withhold from the mortgagee possession of the mortgaged premises for a single day, but it does require him to file certain evidence as a protection to all subsequent purchasers in order to confirm his title, and for the failure to file which, during a period of three months, his foreclosure proceedings are rendered null and void.

It is analagous to a provision of a statute which requires certain and particular evidence to be introduced in a court of law in order for the plaintiff to maintain his action. We submit it would not be seriously contended that the legislature or congress had not such power, even as applied to contracts already made.

Tuthill v. *Tracey,* 31 N. Y. 157, on which plaintiff in error relies to excuse his failure to file an affidavit as required by law, is irrelevant, because in that case no definite time was given for filing the affidavit, while in the case at bar, a specified time was stated within which it must be filed to complete foreclosure proceedings. It was a condition upon the fulfilment of which the validity of the foreclosure depended.

On December 22, 1919, the date the plaintiff in error became assignee, the act of 1917 was in force and had been for more than two years. The assignment reads: "Subject, nevertheless, to the conditions therein contained and *to redemption according to law.*" (P. 26 R). Is not the plaintiff estopped, in good conscience, from assailing the validity of a law under which he *voluntarily* acquired or assumed contractural rights?

In *Oshkosh Waterworks Co.* v. *Oshkosh*, 187 U. S. 437, the Court said:

> "It is well settled that while, in a general sense, the laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of procedure then existing. It is true the Legislature may not withdraw all remedies, and thus, in effect, destroy the contract; nor may it impose such new restrictions or conditions as would materially delay or embarrass the enforcement of rights under the contract according to the usual course of justice as established when the contract was made. Neither could be done without impairing the obligation of the contract. But it is equally well settled that the Legislature may modify or change existing remedies or prescribe new modes of procedure, without impairing the obligation of contracts, provided a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract. *Green* v. *Biddle*, 8 Wheat, 1, 85; *Bronson* v. *Kinzie*, 1 How. 311, 317; *Planters' Bank* v. *Sharp*, 6 How. 301, 327; *Walker* v. *Whitehead*, 16 Wall. 314, 317; *Murray* v. *Charleston*, 96 U. S. 432, 438; *Edwards* v. *Kearzey*, 96 U. S. 595, 601; *Vance* v. *Vance*, 108 U. S. 514, 518; *McGahey* v. *Virginia*, 172 U. S. 102, 104."

In the case at bar, the plaintiff in error had a substantial and efficacious remedy. No right or remedy was taken from him, neither was the remedy changed after foreclosure proceedings were commenced, but the amendment to the statute was enacted two years previous to the commencement of such proceedings. We therefore submit that the amendment of 1917 was not in contravention of either Article 1, Section 10 or the fourteenth Amendment to the Federal Constitution, as claimed by the plaintiff in error, and that the judgment of the State Court should be affirmed.

Respectfully submitted,

FRANK H. HASKELL,
Portland, Maine.

CONLEY *v.* BARTON.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE.

No. 193. Submitted January 9, 1923.—Decided January 29, 1923.

The obligation of a mortgage contract under which the right of redemption is barred after lapse of one year from entry and taking possession by the mortgagee to foreclose, is not impaired by a state law, enacted after the date of the mortgage but before breach of condition, and requiring the mortgagee, if he would sustain such a foreclosure, to make and record, within three months after its completion, an affidavit of the facts. P. 680.

119 Me. 581, affirmed.

ERROR to a judgment of the Supreme Judicial Court of Maine, affirming a judgment for the plaintiff in a suit to redeem property from a mortgage foreclosure.

Mr. H. A. Hegarty and *Mr. J. B. Flynn* for plaintiff in error.

Mr. Frank H. Haskell for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the Court.

Suit to redeem from a mortgage which was executed by defendant in error to one George W. Towle to secure his

promissory note for the payment to Towle of the sum of $2,000 and interest. The note and mortgage were dated October 14, 1905.

On February 20, 1919, a breach of the mortgage was committed and the holder of it, under the laws of the State, foreclosed it by taking possession of the mortgaged premises and duly recorded a certificate of the fact in the Registry of Deeds of the proper county.

The bill as originally drawn was based upon an alleged effort to redeem the mortgaged premises by payment of the amount due upon the note and mortgage before the time of redemption expired, in which effort, plaintiff alleges he failed by the absence of Conley from his residence and place of business.

Plaintiff (defendant in error), however, amended his bill to read as follows: "The plaintiff further alleges that more than three months have elapsed since the expiration of one year from the time when the legal representatives of the mortgagee of the mortgage described in the plaintiff's bill, took possession of the mortgaged property for the purpose of foreclosing said mortgage but neither the mortgagee nor the holder of record of said mortgage, nor the legal representative or legal representatives, of either the mortgagee or holder of record of said mortgage nor any other person, has signed and sworn to an affidavit as required in cases of foreclosure of mortgages of real estate by Section 4 of Chapter 95 of the Revised Statutes of Maine as amended by Chapter 192 of the Public Laws of A. D. 1917, and no such affidavit has been recorded in the Registry of Deeds where the certificate of said foreclosure is recorded, as required by said statute, and these facts were not known to the plaintiff at the time of filing his said bill as said three months had not elapsed at the time of filing said bill."

Plaintiff in error, answering the amendment, alleges that c. 192 of the Public Laws of 1917 "has no applica-

tion and no relevancy to the plaintiff's [defendant in error's] rights or cause of action herein," and that if it be claimed that such chapter grants any additional time beyond the one year as covenanted in the mortgage deed, the act "would be contrary to the provisions of Section 10 of the Constitution of the United States and to the covenant of the mortgage deed itself, and, therefore, void and of no effect." An estoppel was also pleaded.

The mortgage contained a provision by which the mortgagor covenanted with the mortgagee that the right to redeem the mortgaged premises should be forever foreclosed in one year next after the commencement of foreclosure by any of the methods then provided by law, and one of the methods provided was entry into possession of the mortgaged premises and holding the same by consent in writing of the mortgagor, or the person holding under him.

It is, however, provided by c. 192 of the Public Laws of 1917, that possession so obtained (or by any other of the three modes provided) "and continued for one year" will "forever foreclose the right of redemption," provided however, "that an affidavit signed and sworn to by the mortgagee or by the holder of record of the mortgage, or their legal representatives, is, within three months after the expiration of one year from the taking of such possession, recorded in the registry of deeds where the certificate of foreclosure is recorded; . . ."

On February 20, 1919, a breach of the mortgage having been committed, the holder of the mortgage assigned it to the plaintiff in error, Conley, but two years before that time the act providing for the filing of the affidavit as above stated, was passed and its effect is the principal controversy in this case. Defendant in error urges it to sustain his right to redemption; plaintiff in error asserts that it is inapplicable, and contends that if held applicable, it is invalid as impairing the obligation of his contract, the mortgage.

The trial court decided that the provision was applicable and valid. These conclusions were affirmed by the Supreme Court. 119 Me. 581. "There can be no doubt," the Supreme Court said, "that the amendment by its terms relates to all foreclosures begun after its passage including foreclosures of prior existing mortgages." In reply to the contention that the statute impairs the obligation of the contract constituted by the mortgage "by extending the foreclosure period for three months after the expiration of the year," it was said: "But the statute does not extend the foreclosure period. In effect it imposes a condition which the mortgagee must perform or be held to have waived his foreclosure. He may perform the condition at once on the expiration of the year or at his option at any time within three months. If the affidavit is seasonably recorded the foreclosure is complete at the end of the year. If not, it is invalidated."

By a rescript by one of the Justices the case is given a clearer definition. Chapter 192 of the laws, it was decided, requires a mortgagee within "thirty days" after completion of foreclosure to record in the Registry of Deeds an affidavit setting forth the facts and that the affidavit is made the condition upon which the validity of the foreclosure depends. And further, that it applied to mortgages dated before 1917 and which contain a one-year foreclosure covenant, which the court denominated "the familiar form." The conclusion was that such "foreclosure clause" was "not such a contract as is contemplated and protected by the constitution." And further that the act related to the remedy for the enforcement of rights, and that while an act may not so far affect the remedy as to impair the obligation of a contract, the test in such case "is whether the value of the contract is lessened and whether a substantial and efficacious remedy remains." It was decided that the act sustained the test.

The basic principles that determine this case are elementary. The obligation of a contract can not be im-

paired by a law passed after the contract was entered into, and the remedy for enforcement of the contract may be so far a part of it as to be within the principle that protects it. But the remedy may not have that intimacy of relation and a regulation or change of it may not impair its efficiency or lessen the obligation of the contract.

It is recognized that the legislature may modify or change existing remedies or prescribe new modes of procedure without impairing the obligation of contracts if a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract. *Oshkosh Waterworks Co.* v. *Oshkosh*, 187 U. S. 437; *Barnitz* v. *Beverly*, 163 U. S. 118. These cases are complementary. In the first, an alteration of the remedy was sustained; in the second, the remedy was adjudged so intimate in its relation to the contract as to be within its obligation and immunity from change. The first is the reliance of defendant in error; the second of plaintiff in error. Our inquiry, therefore, is, which determines the case at bar?

The statute in execution of the purpose of the State, enjoins a duty upon the mortgagee, the effect of the nonperformance of which the mortgagor may avail of. In other words, the duty not performed, the attempt at foreclosure is null and void, and necessarily, therefore, it is no impediment to redemption of the mortgage by the mortgagor. It does not withhold possession of the premises for a single day, nor does it defeat the efficacy of possession as foreclosure. And we have seen, the Supreme Court of the State, passing upon it, decided that compliance with it does not involve any delay. The mortgagee may perform the condition at once or at his option any time within three months. It, therefore, only imposes a condition, easily complied with, which the law, for its purposes, requires. And the condition was required, and its purpose declared long before plaintiff in error's attempt at foreclosure.

We think it would be extreme to hold that this is outside of the power of the State over remedies; and the law of the State has precedents of justification in *Vance* v. *Vance*, 108 U. S. 514; *Curtis* v. *Whitney*, 13 Wall. 68.

Decree affirmed.